DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

o. 85-494-CFX
tatus: GRANTED

ocketed:
eptember 18, 1955

Title: California Federal Savings and Loan Association, et al., Petitioners
v.
Mark Guerra, Director, Department of Fair Employment and Housing, et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Olson, Theodore B.

Counsel for respondent: Johnson, Marian M.

ntry	Date	Note	Proceedings and Orders
1	Sep 18 1985	G	Petition for writ of certiorari filed.
2	Oct 16 1985		Brief amicus curiae of Chamber of Commerce of the US filed.
3	Oct 22 1985		Brief of respondents Mark Guerra, Dir., et al. in opposition filed.
4	Oct 23 1985		DISTRIBUTED. November 8, 1985
5	Oct 29 1985	X	Reply brief of petitioners CA Fed. Savings & Loan filed.
6	Dec 4 1985		REDISTRIBUTED. January 10, 1986
7	Jan 13 1986		Petition GRANTED.
			**********
8	Feb 12 1986		Record filed.
10	Feb 12 1986		Order extending time to file brief of petitioner on the merits until March 27, 1986.
11	Mar 19 1986		Order further extending time to file brief of petitioner on the merits until April 4, 1986.
12	Apr 3 1986		Application of National Organization for Women, et al. for leave to file a brief as amici curiae in excess
13	Apr 3 1986		of the page limitation filed, and order granting same by Rehnquist, J., on April 3, 1986. The brief may not
14	Apr 3 1986		exceed 31 pages.
15	Apr 4 1986		Brief amicus curiae of Chamber of Commerce of the US filed.
16	Apr 4 1986		Brief amicus curiae of Equal Employment Advisory Council filed.
17	Apr 4 1986		Brief amicus curiae of United States filed.
18	Apr 4 1986		Lodging received.
19	Apr 4 1986		Brief amicus curiae of Natl. Organization of Women, et al. filed.
20	Apr 4 1986		Joint appendix filed.
21	Apr 4 1985		Brief of petitioners CA Federal Savings and Loan filed.
22	Apr 4 1986		Brief amicus curiae of ACLU, et al. filed.
25	Apr 10 1986		Order extending time to file brief of respondent on the merits until June 12, 1986.
26	Apr 19 1986	D	Motion of American Civil Liberties Union, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
27	Apr 28 1986		Motion of American Civil Liberties Union, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED.
28	Jun 11 1986		Brief amicus curiae of California Women Lawyers, et al.

o. 85-494-CFX

ntry	Date	Note	Proceedings and Orders
			filed.
29	Jun 12 1986		Brief amicus curiae of Natl. Conference of State Legislatures, et al. filed.
30	Jun 11 1986		Brief amicus curiae of Coalition for Reproductive Equality, et al. filed.
31	Jun 12 1986		Brief amicus curiae of AFL-CIO filed.
32	Jun 12 1986		Brief amicus curiae of Equal rights Advocates, et al. filed.
33	Jun 12 1986		Brief amicus curiae of Human Rights Advocates, et al. filed.
34	Jun 12 1986		Brief amicus curiae of Connecticut, et al. filed.
35	Jun 12 1986		Brief of respondents Mark Guerra, Dir., et al. filed.
36	Jun 12 1986		Brief amicus curiae of Lillian Garland filed.
37	Jul 17 1986		CIRCULATED.
38	Jul 28 1986		SET FOR ARGUMENT. Wednesday, October 8, 1986. (1st case) (1 hour)
39	Sep 29 1986	X	Reply brief of petitioners CA Fed. Savings & Loan, et al. filed.
41	Oct 8 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-494 (1)

Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation;

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents,

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT S. WARREN
WILLARD Z. CARR, JR.
THEODORE B. OLSON
*PAMELA L. HEMMINGER
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Attorneys for Petitioners California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce

* Counsel of Record

76P

QUESTIONS PRESENTED

Whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, permits disparate and more favorable treatment of employees disabled by pregnancy than of employees disabled by other medical conditions who are similar in their ability or inability to work;

Whether California law, which establishes a pregnancy-based classification and which mandates that employees disabled by pregnancy receive disability leave and reinstatement rights which employees disabled by other medical conditions are not entitled to receive, is inconsistent with and preempted by Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978.*

---

* All petitioners and respondents in this action are named in the caption; however, the applicant for intervention in the proceeding below has not been named. Lillian Garland, an employee whose complaint triggered enforcement activity against California Federal Savings and Loan Association by the Department of Fair Employment and Housing, sought to intervene in the action after judgment was entered by the District Court. The motion to intervene was denied, and an appeal was filed with the Ninth Circuit, No. 84-5844. That appeal was consolidated with the appeal in this action, No. 84-5843. The denial of the motion to intervene was affirmed by the Ninth Circuit, and review of that decision has not been sought to date. Petitioners have given notice pursuant to Supreme Court Rule 19.6 of their belief that Garland has no interest in the outcome of this petition for certiorari.

CalFed Inc. is the parent company of petitioner California Federal Savings and Loan Association. In addition to California Federal Savings and Loan Association, there are four other first tier subsidiaries of CalFed Inc.: California Thrift and Loan, Trust Services of America, Inc., CalFed Investment Corp. and CalFed Insurance Corporation. Petitioners Merchants and Manufacturers Association and the California Chamber of Commerce brought suit on behalf of their members who have fifteen or more employees and are "employers" within the meaning of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e(b)) and within the meaning of the California Fair Employment and Housing Act (Cal. Gov't Code § 12926(c)). Local Chambers of Commerce in California are affiliated with the California Chamber of Commerce.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
I. CRITICAL ISSUES OF NATIONAL IMPORT WHICH STRIKE TO THE HEART OF TITLE VII'S PROHIBITION OF SEX DISCRIMINATION ARE PRESENTED AND SHOULD BE RESOLVED BY THIS COURT	10
A. THE LANGUAGE OF THE PDA AND CLEAR LEGISLATIVE HISTORY ESTABLISH THAT PREGNANCY-BASED CLASSIFICATIONS ARE UNLAWFUL AND THAT PREGNANCY MAY NOT BE TREATED *SUI GENERIS*	12
B. THE COURT OF APPEALS' DECISION SERIOUSLY IMPAIRS EFFECTIVE ADMINISTRATION AND ENFORCEMENT OF TITLE VII BY THE E.E.O.C.	16
C. THE NINTH CIRCUIT'S HOLDING THAT SEX DISCRIMINATION BASED ON PREGNANCY IS PERMISSIBLE, EVEN LAUDABLE, SETS AN EXTREMELY DANGEROUS PRECEDENT	17
D. AFFIRMATIVE ACTION PRINCIPLES ARE NOT RELEVANT TO THIS CASE	22
II. THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT	23
CONCLUSION	27
APPENDICES	

TABLE OF AUTHORITIES

CASES	PAGE
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)	12
Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983)	26
Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972)	21
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	5, 23
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	16
Homemakers, Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976)	21
Immigration and Naturalization Service v. Phinpathya, 464 U.S. 183 (1984)	12
Kansas Association of Commerce and Industry v. E.E.O.C., 33 FEP Cases 588 (D. Kan. 1983)	16
Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978)	26
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)	25
Miller-Wohl Co. v. Commissioner of Labor and Industry, 692 P.2d 1243 (Mont. 1984), *appeal filed*, No. 84-1545 (March 27, 1985)	11
Muller v. Oregon, 208 U.S. 412 (1908)	18
Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669 (1983)	8, 13, 23
Orr v. Orr, 440 U.S. 268 (1979)	19
Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 105 S. Ct. 658 (1985)	12
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971)	19
United Steelworkers v. Weber, 443 U.S. 193 (1979)	22

STATUTES — PAGE

Federal

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.* 3
Section 701(b), 42 U.S.C. § 2000e(b) i
Section 701(j), 42 U.S.C. § 2000e(j) 14
Section 701(k), 42 U.S.C. § 2000e(k) 3, 5, 8, 13
Section 703(h), 42 U.S.C. § 2000e-2(h) 3
Section 708, 42 U.S.C. § 2000e-7 3
Civil Rights Act of 1964, Title XI, Section 1104, 42 U.S.C. § 2000h-4 3
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 ..... *passim*
Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* 14

State

California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.* 3
Cal. Gov't Code § 12945(b)(2) 4, 6
Cal. Gov't Code § 12926(c) i
Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West Supp. 1984) 10
Mass. Gen. Laws Ann., ch. 149, § 105D and ch. 151B, § 4.11A (West Supp. 1985) 10
Mont. Code Ann. §§ 49-22-310 and 49-22-311 (1983) 10

CONSTITUTION

U.S. Const. art. VI, cl. 2 2

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749 ..... 14, 15, 20
Legislative History of the Pregnancy Discrimination Act of 1978, Committee Print prepared for the Senate Committee on Labor and Human Resources (1980) 14

LEGISLATIVE MATERIALS (continued) — PAGE

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) 15
123 Cong. Rec. 8144 (1977) (remarks of Senator Bayh) 17
123 Cong. Rec. 29664 (1977) (remarks of Senator Brooke) 20
124 Cong. Rec. 21439 (1978) (remarks of Rep. Akaka) 18

ADMINISTRATIVE MATERIALS

Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1984) 3
Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. Part 1604 (Appendix) (1984) 16
Proposed Regulations of the California Fair Employment and Housing Commission, Section 7291.2 4

OTHER

Brief of the E.E.O.C. in *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., reprinted in BNA's Law Reprints, Labor Law Series,* Volume 16, No. 25, 1982/83 Term, at 179 25

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation;

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents,

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners California Federal Savings and Loan Association ("Cal Fed"), Merchants and Manufacturers Association and the California Chamber of Commerce ("the Associations") respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 16, 1985, and amended by order of May 7, 1985.

OPINIONS BELOW

The Ninth Circuit rendered two opinions, one published at 758 F.2d 390 and the other unpublished. These opinions are reproduced herein as Appendices A and B, respectively. The Order amending the published opinion is reproduced as Appendix C, and the Order denying Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced as Appendix D. The opinion of the United States District Court for the Central District of California is unofficially reported at 34 FEP Cases 562 and is reproduced as Appendix E.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 16, 1985. A Petition For Rehearing and Suggestion For Hearing *En Banc* was timely filed on April 30, 1985, and was denied on June 21, 1985. This Petition is being timely filed within ninety days of that date.

CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY INVOLVED

Constitution of the United States

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Federal Law and Authority

Section 701(k) of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 2000e-2(h) [Section 703(h)] of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k).

Section 708 of Title VII, 42 U.S.C. § 2000e-7, and Section 1104 of Title XI of the Civil Rights of 1964, 42 U.S.C. § 2000h-4, provide that state laws which purport to require or permit the doing of any act which would be unlawful under Title VII or which are inconsistent with Title VII are preempted. These statutes are reproduced at Appendix F.

The Equal Employment Opportunity Commission ("E.E.O.C.") has promulgated guidelines concerning pregnancy discrimination as part of its Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1984), relevant provisions of which are also reproduced at Appendix F.

State Law And Authority

The California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.*, provides, *inter alia*:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
>
> . . .

> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . .
>
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth or related medical conditions. . . .

Cal. Gov't Code § 12945(b)(2).

The State defendants have determined that the right to take a "leave" necessarily includes the right to return to work at the expiration of the period of disability. Accordingly, as interpreted and enforced by the State defendants, two additional significant requirements are imposed by California law. First, California employers must reinstate employees returning from a pregnancy disability leave to the same job, unless justified by business necessity; if business necessity is demonstrated, the employer must make reasonable efforts to reinstate the employee to a similar job. Second, a rebuttable presumption has been established that the job in question can be either held open or filled by a temporary replacement. These requirements are embodied in the proposed regulations of the California Fair Employment and Housing Commission ("FEHC"), Section 7291.2, reproduced here at Appendix F.[1]

[1] The State entered into Stipulated Findings of Fact that the proposed regulations contained the State's enforcement policy. These Stipulated Facts are set forth in full in the District Court's decision reproduced here at Appendix E. Hereafter, the statute and these regulations are collectively referred to as the "California pregnancy law."

STATEMENT OF THE CASE

This case squarely presents the issue of the validity of the California pregnancy law which establishes a sex-based classification requiring California employers to provide preferential disability leave and reinstatement rights to employees disabled by pregnancy. At issue is whether the California law requiring preferential treatment conflicts with federal law which mandates the same treatment of employees affected by pregnancy as of employees affected by other medical conditions, based upon the Congressional determination that pregnancy should not be treated *sui generis*. At issue is whether a women's "protective" law which places women disabled by pregnancy in a class by themselves is inconsistent with Title VII's prohibition of pregnancy discrimination.

This case has its roots in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The Court there held that the exclusion of pregnancy from an otherwise comprehensive disability insurance plan did not constitute unlawful sex discrimination and that discrimination on the basis of pregnancy was not sex discrimination. In 1978, the California legislature and Congress responded and enacted statutes designed to vitiate the *Gilbert* decision.

Congress determined that discrimination on the basis of pregnancy, childbirth or related medical conditions[2] is discrimination on the basis of sex and declared that women affected by pregnancy "shall be treated the same for all employment-related purposes" as "persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). These principles are embodied in the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92

[2] The term "pregnancy" hereafter includes "pregnancy, childbirth or related medical conditions."

Stat. 2076. The California legislature, however, determined that pregnancy merited "special" sex-based treatment. That same year, it enacted a comprehensive law which specifically required employers to provide a pregnancy disability leave of up to four months.[3]

As the parties to this lawsuit have stipulated, the State defendants—the California Fair Employment and Housing Commission and the California Department of Fair Employment and Housing—were actively enforcing the California pregnancy law against Cal Fed and against members of the Associations with disability leave policies similar to the Cal Fed policy. As interpreted and enforced by the State defendants, the California pregnancy law not only requires the four month pregnancy disability leave, but also (1) requires employers to reinstate employees returning from pregnancy disability leaves to the same job unless justified by business necessity (in which case the employer must make reasonable efforts to reinstate the employee to a similar job); and (2) establishes a rebuttal presumption that the job in question can be held open or filled by a temporary replacement. These requirements are imposed even though employees disabled by other medical conditions are not entitled to the same disability and reinstatement rights.

In May, 1983, the California Department of Fair Employment and Housing issued an administrative accusation against Cal Fed on behalf of Lillian Garland, a Cal Fed employee who had not been immediately reinstated at the conclusion of her

[3] Cal. Labor Code § 1420.35, Stats 1978, ch. 1321 § 1. In 1979, after the passage of the PDA, the state law was amended to exclude Title VII employers from coverage under certain provisions of the statute; however, Labor Code § 1420.35(b)(2), requiring employers to extend up to a four month pregnancy disability leave was expressly declared applicable to employers subject to Title VII. Stats 1979, ch. 13 § 1. In 1980, Cal. Labor Code § 1420.35(b)(2) was codified in its present form at Cal. Gov't Code § 12945(b)(2). Stats 1980, ch. 992 § 4.

pregnancy leave. In the accusation, the Department also sought an order requiring Cal Fed to modify its disability leave policy to conform to California law.[4]

On August 1, 1983, Cal Fed and the Associations filed this action for injunctive and declaratory relief, alleging that the California pregnancy law is inconsistent with and preempted by federal law. Cal Fed sought and obtained a preliminary injunction against the enforcement of the California pregnancy law during the pendency of the lawsuit. The parties filed cross-motions for summary judgment, based upon stipulated facts. On March 19, 1984, the District Court granted summary judgment for plaintiffs, holding that the California law establishing a pregnancy-based classification conflicts with the PDA and is therefore preempted. The State defendants appealed the District Court's decision to the Ninth Circuit Court of Appeals.

In a stunning departure from basic Title VII principles, the Ninth Circuit reversed the District Court and ordered that summary judgment be entered in favor of the State defendants. The Court of Appeals held that Congress, in enacting the PDA, intended "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." 758 F.2d at 396. The gravamen of the Ninth Circuit's opinion is clear—Title VII prohibits discrimination *against* women on the basis of pregnancy, but it permits discrimination *in their favor* on that basis.

[4] Cal Fed's disability leave policy is applicable to all disabilities, whether or not due to pregnancy. It allows at least six months' leave but does not define "leave," as required by the State, to provide for reinstatement of employees returning from a pregnancy disability leave to the same job absent business necessity. Instead, all employees returning from a disability leave are entitled to reinstatement to the same job if available; if not available, reinstatement to other available jobs is provided. If no similar or suitable job is available, the right to terminate employment is reserved.

In reaching its conclusion, the Ninth Circuit relied on *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983), in which this Court held that increased cost is not a defense to otherwise unlawful discrimination based on pregnancy. The Court of Appeals construed that holding as an endorsement of disparate and more favorable treatment for employees disabled by pregnancy than for employees disabled by other medical conditions.

The Ninth Circuit also held that pregnancy-based classifications requiring preferential treatment of pregnancy enhance equal employment opportunites for women, finding support for this view in cases upholding voluntary affirmative action programs. What the court failed to recognize, however, is that the issue here is not the elimination of the effects of past discrimination through voluntary, sex-conscious measures. Rather, the issue in this case is the lawfulness of *permanent* differential treatment of pregnancy. Moreover, the court failed to consider the dangerous history of well-intentioned women's protective laws—laws which have been uniformly invalidated.

The Court of Appeals' decision is one of first impression concerning the scope of Title VII's prohibition of pregnancy-based discrimination. Yet, the opinion does no more than lightly touch upon the express, and directly relevant, language of the PDA that women affected by pregnancy "*shall* be treated the *same* as persons affected by other medical conditions but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (emphasis added). The opinion does not even mention the unusually clear legislative history reflecting the Congressional determination that pregnancy may not be treated *sui generis*. The decision overrules *sub silentio* the E.E.O.C.'s Guidelines on Discrimination Because of Sex; those Guidelines provide that it is unlawful to extend benefits to employees affected by pregnancy which are not equally available to employees affected by other medical conditions.

The Ninth Circuit clearly failed to subject the pregnancy-based classification to the same scrutiny as other sex-based classifications. Instead, the court found that purposeful and intentional disparate treatment of pregnancy is permissible. According to the Ninth Circuit, the measure of unlawful discrimination on the basis of pregnancy is different than the measure of unlawful discrimination on the basis of race, color, religion, sex and national origin.

REASONS FOR GRANTING THE WRIT

I

CRITICAL ISSUES OF NATIONAL IMPORT WHICH STRIKE TO THE HEART OF TITLE VII'S PROHIBITION OF SEX DISCRIMINATION ARE PRESENTED AND SHOULD BE RESOLVED BY THIS COURT.

The foundation of the law of equal employment opportunity and the fundamental principle upon which Title VII is based is that it is unlawful to classify and treat employees differently on the basis of race, color, religion, sex and national origin. As a result, state laws and employment practices establishing race-based and sex-based classifications have been struck down as the clearest and most invidious forms of prohibited discrimination.

The Ninth Circuit held that the prohibition of discrimination on the basis of pregnancy is to be interpreted in a novel manner contrary to the manner in which Title VII has been interpreted in cases involving discrimination on other prohibited bases. This case presents the issue whether the PDA prohibits discrimination against women affected by pregnancy but permits discrimination in their favor. Such an interpretation of Title VII is unprecedented and breaks with all established Title VII principles.

Although the validity of a California law establishing a pregnancy-based classification is the immediate issue before the Court, the resolution of this issue is of far broader significance. States other than California have enacted statutes establishing pregnancy-based classifications.[5] Moreover, the resolution of

[5] *See, e.g.*, Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West Supp. 1984); Mass. Gen. Laws Ann., ch. 149, § 105D and ch. 151B, § 4.11A (West Supp. 1985); Mont. Code Ann. §§ 49-22-310, 49-22-311 (1983).

this issue will delineate the scope of lawful employment practices of all Title VII employers in all fifty states, whether or not a state statute providing for disparate treatment of pregnancy has been enacted. Because the Ninth Circuit has unequivocably held that discrimination on the basis of pregnancy is lawful if the discrimination is in favor of women affected by pregnancy, no limitations whatsoever have been set on the extent to which benefits may be extended to employees affected by pregnancy which are unavailable to employees affected by other medical conditions.

These are critical issues of national concern which should be resolved by this Court. This Court should resolve the issue whether Congress intended to legislate a standard of discrimination permitting disparate and preferential treatment of employees on the basis of pregnancy or whether Congress intended to prohibit disparate treatment on the basis of pregnancy in the same manner as it has prohibited disparate treatment on other Title VII bases. If Title VII's prohibition of discrimination on the basis of pregnancy is to be interpreted as a "one way street," protecting women affected by pregnancy from discrimination but not protecting employees not so affected but similar in their ability or inability to work, it is for this Court to declare. Absent review by this Court, the Ninth Circuit decision will herald a return to the era of women's protective laws and approved sex discrimination. The critical issue of the scope of the federal prohibition of pregnancy discrimination should be decided by this Court, defining not only the obligations of Title VII employers but the rights of Title VII employees.[6]

[6] Presently before the Court is the appeal from the Supreme Court of Montana in *Miller-Wohl Co. v. Commissioner of Labor and Industry*, 692 P.2d 1243 (Mont. 1984), *appeal filed*, No. 84-1545 (March 27, 1985). At issue in that case is the constitutionality of the Montana pregnancy discrimination law mandating preferential treat-

(footnote continued on following page)

A. The Language Of The PDA And Clear Legislative History Establish That Pregnancy-Based Classifications Are Unlawful And That Pregnancy May Not Be Treated Sui Generis.

It is well established that, in interpreting a federal statute, the starting point is the language of the statute itself. Moreover, this Court has repeatedly declared that, absent a clearly expressed legislative intention to the contrary, it is to be presumed that the ordinary meaning of the statutory language accurately reflects the legislative purpose. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 105 S. Ct. 658, 662 (1985) ("Statutory construction must begin with language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183 (1984) ("This Court has noted on numerous occasions that 'in all cases involving statutory construction, our starting point must be the language employed by Congress,' . . . and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' "). Courts have followed this canon of statutory construction in interpreting Title VII. In *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), for example, the Court interpreted Title VII in accordance with the plain language of the statute, holding that Section 703(h) protects bona fide seniority systems adopted after as well as before the effective date of the Act. This rule is equally applicable here.

(footnote continued from previous page)
ment of employees affected by pregnancy. Petitioners submit that a writ should be granted in this case which squarely presents the issue whether state law requiring disparate treatment of pregnancy is preempted by Title VII and which comes to this Court based upon unambiguous stipulated facts. Petitioners respectfully urge the Court either to consolidate this case with *Miller-Wohl* for decision or to decide the issues herein presented, thereafter ruling on the *Miller-Wohl* appeal in accordance with the Court's decision in this case.

The express language of the PDA is unusually clear. In the first clause, Congress declared that the general Title VII prohibition of discrimination on the basis of sex includes discrimination on the basis of pregnancy. The second clause of the statute sets forth the consequences and application of this basic principle.[7] Women affected by pregnancy *"shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."* 42 U.S.C. § 2000e(k) (emphasis added). This formulation is precise and unequivocal.

Thus, the PDA establishes a simple and straightforward standard by which to measure compliance with the prohibition of pregnancy discrimination. The statute does *not* state that women affected by pregnancy shall be treated no less beneficially than employees affected by other medical conditions. The statute does *not* state that women affected by pregnancy may be extended employment benefits greater than those extended to employees affected by other medical conditions. *On its face*, the statute provides that the key consideration and the appropriate measure of discrimination based upon pregnancy is whether employees affected by pregnancy are treated in the *same* manner as employees affected by other medical conditions who are similar in their ability or inability to work. It was the conclusion of Congress that the fact that the underlying medical condition is pregnancy rather than some other medical condition—some unique to men, some unique to women and some common to both sexes—is an unlawful basis for making distinctions in treatment among employees.

---

[7] In *Newport News*, the Court stated: "The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees." 462 U.S. at 678 n.14.

Moreover, the plain language of the PDA accurately reflects Congressional intent in enacting the PDA.[8] The legislative history of the PDA establishes that intent conclusively—women affected by pregnancy are to be treated the same as other employees based upon ability or inability to work. As stated in the report of the House Committee on Education and Labor:

> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. H.R. 6075 in no way requires the institution of any new programs where none currently exist. *The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.*

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 4 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4752; Legislative History of the Pregnancy Discrimination Act of 1978, Committee Print prepared for the Senate Committee on Labor and Human Resources 150 (1980) (hereinafter "Leg. Hist.") (emphasis added).

---

[8] Congress has clearly demonstrated the ability to set forth the scope of Title VII's various prohibitions of discrimination. For example, Congress established a "reasonable accomodation" standard to judge whether unlawful religious discrimination has occurred. 42 U.S.C. § 2000e(j). In enacting the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 *et seq.*, Congress imposed affirmative action obligations on certain federal contractors to eliminate discrimination on the basis of handicap. 29 U.S.C. § 793.

Congress itself rejected the view that, because only women can become pregnant, classifications based upon pregnancy are permissible, because they are somehow different from other sex-based classifications. The House Committee report clearly states that "distinctions based on pregnancy are *per se* violations of Title VII" and that "[p]regnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 3, 4 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4751, 4752; Leg. Hist. at 149, 150. Similarly, the report of the Senate Committee on Human Resources provides:

> [T]he bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions. . . . Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.

S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977), *reprinted in* Leg. Hist. at 41.

Thus, the Ninth Circuit adopted the view that had already been specifically rejected by Congress in enacting the PDA. Given the express statutory language and the legislative history of the PDA, this Court should determine whether the Ninth Circuit could correctly uphold a pregnancy-based classification without consideration of the functional comparability of pregnancy to other medical conditions, without subjecting the classification to the same scrutiny as other sex-based classifications, and without consideration of the Congressionally-intended measure of pregnancy discrimination—equal treatment.

B. The Court of Appeals' Decision Seriously Impairs Effective Administration And Enforcement Of Title VII By The E.E.O.C.

The Guidelines of the E.E.O.C. are to be accorded substantial deference by the courts. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). Yet, the Court of Appeals failed even to mention, let alone consider, the E.E.O.C. Guidelines concerning pregnancy discrimination and the E.E.O.C.'s determination that it is unlawful to extend benefits to pregnant employees which are not similarly extended to employees affected by other medical conditions. Incredibly, the Ninth Circuit completely disregarded Number 29 of the "Questions and Answers on the Pregnancy Discrimination Act" in which the E.E.O.C. interprets the PDA to forbid employers from offering post-termination medical benefits for pregnancy which are not equally available for other medical conditions.[9] The court ignored the E.E.O.C.'s interpretation of the PDA that leave and reinstatement policies must afford the *same* treatment to employees affected by pregnancy as is afforded to employees disabled by other medical conditions.[10] The effect of the Ninth Circuit's decision, rejecting the Guidelines of the E.E.O.C. as unworthy even of mention, is to invalidate *sub silentio* the E.E.O.C.'s interpretation of the PDA.

---

[9] 29 C.F.R. Part 1604 (Appendix). This Guideline, set out in full in Appendix F, was upheld in *Kansas Association of Commerce and Industry v. E.E.O.C.*, 33 FEP Cases 588, 593 (D. Kan. 1983): "We must agree with the defendant [E.E.O.C.] that a provision of extended benefits for pregnancy only by an employer violates Title VII's basis ban on sex discrimination, by extending greater protection to women than to men."

[10] 29 C.F.R. § 1604.10(b) and Question and Answer No. 9 are set forth in full in Appendix F. The current E.E.O.C. Guidelines are consistent with the Guidelines issued in 1972 and considered in *Gilbert*. Those Guidelines provided that "[w]ritten and unwritten employment policies and practices . . . shall be applied to disability

(footnote continued on following page)

Should the Ninth Circuit's decision become final, unreviewed by this Court, nationwide uncertainty will exist concerning the validity of the E.E.O.C. Guidelines on pregnancy. In the Ninth Circuit, certainly, employers and employees who rely on the E.E.O.C. Guidelines to ascertain their responsibilities and rights will do so at their peril. The Ninth Circuit's decision in this case simply cannot be reconciled with the E.E.O.C.'s position that (1) pregnancy-based classifications are unlawful, and (2) the measure of pregnancy discrimination is whether employees affected by pregnancy are treated in the same manner as employees affected by other medical conditions but similar in their ability or inability to work. Absent resolution by this Court of the conflict between the Ninth Circuit's decision and the E.E.O.C. Guidelines, effective and consistent enforcement of Title VII by the Title VII enforcement agency will be seriously impaired.

C. The Ninth Circuit's Holding That Sex Discrimination Based On Pregnancy Is Permissible, Even Laudable, Sets An Extremely Dangerous Precedent.

The Ninth Circuit decision reflects the antiquated and long-discredited notion that it is acceptable for states to enact laws designed to "protect" women workers. Prior to the enactment of Title VII, women were "protected" as a result of their physical characteristics and childbearing function. This

---

(footnote continued from previous page)
due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. § 1604.10(b) (1975). In *Gilbert*, dissenting Justice Brennan stated that these Guidelines merited great deference (429 U.S. at 156-57) and this was noted in the Congressional debate on the PDA. 123 Cong. Rec. 8144 (1977), *reprinted in* Leg. Hist. at 18 (Remarks of Senator Bayh).

view is embodied in the 1908 holding in *Muller v. Oregon*, 208 U.S. 412 (1908):

> That woman's principal structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. . . . [*S*]*he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.* . . . [H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her. . . .

208 U.S. at 421-22 (emphasis added).

If allowed to stand, the Ninth Circuit decision and the California pregnancy law signal an aggressive return to the pre-Title VII era of protectionist legislation, and a patent reversion to the view that because women become pregnant they are in need of special treatment. There is no evidence whatsoever that Congress intended this result. Nor is there any evidence that, as a result of pregnancy, working women as a class are affected by disabilities to a greater extent than working men.[11] Indeed, the

[11] In debating the PDA, Representative Akaka stated:

> Another concern I have heard expressed is that the average duration of women's compensated disabilities will greatly increase when employers include pregnancy disabilities in their plans. Again, the Hawaii experience indicates that this problem is unlikely to materialize. In 1975, the average duration figure for women actually was lower than for men, even though pregnancy disabilities were included in the calculations. The average duration for men was 5.1 weeks; the average duration for women was only 4.4 weeks.

124 Cong. Rec. 21439 (1978), *reprinted in* Leg. Hist. at 178.

Ninth Circuit expressly disavowed any reliance on disparate impact analysis in its opinion.[12] Rather, it held that the PDA permits disparate treatment of pregnancy as long as pregnancy is treated no less beneficially than other medical conditions, declaring that Congress intended "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise" (758 F.2d at 396), and that the California pregnancy law enhances equality of employment opportunity. *Id.* Thus, the Ninth Circuit has attempted to justify California's preferential treatment of pregnancy as "good" sex discrimination.

For decades, the view that, because of their unique biological function, women should be placed in a "class apart" resulted in their relegation to the now-notorious "gilded cage." As noted by the court in *Orr v. Orr*, 440 U.S. 268, 283 (1979), in the equal protection context: "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *See also Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971) (the Congressional purpose of Title VII is to "eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work"). Certainly, mandated "special" treatment of employees disabled by pregnancy in leave and reinstatement policies carries the risk that female employees and applicants will once again be viewed systematically as potentially preg-

[12] "We need not determine, as the litigants would have us do, whether Title VII compels employers to grant reasonable pregnancy disability leave to protect women from the potentially disparate impact of facially neutral, but inadequate, disability leave policies; . . ." 758 F.2d at 394. In actual fact, petitioners argued that disparate impact issues were not before the court since the California pregnancy law requires disparate treatment.

nant, and thus, less desirable—not to mention more expensive—than similarly situated male employees and applicants.

In enacting the PDA, Congress expressly rejected a reliance on sexual stereotypes and sought to "demystify" pregnancy. In the employment context, it declared that women disabled by pregnancy should be treated the same as other employees, based on their ability or inability to work, rather than on the cause of the disability.

> [T]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs. H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and *specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.*

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 3 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4751; Leg. Hist. at 149 (emphasis added). In the Senate debate, Senator Brooke was emphatic on this point:

> And I would emphasize most strongly that S. 995 in no way provides special disability benefits for working women. They have not demanded, not asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men.

123 Cong. Rec. 29664 (1977), *reprinted in* Leg. Hist. at 135.

Congress has determined that women should be placed on an equal footing with men. To effect this determination, it has

outlawed classifications based on pregnancy and differential treatment of pregnancy, however well-intentioned. Thus, this Court should strike down the California pregnancy law as invalid and preempted by the PDA under the Supremacy Clause.[13]

---

[13] In the late sixties and early seventies, a number of state statutes and regulations enacted to "protect" women were found to conflict with Title VII's prohibition of sex discrimination. Certain of these cases involved state laws which mandated preferential or "beneficial" treatment of women. It was frequently argued that the statutes did not conflict with Title VII because the "beneficial" treatment could be extended to all employees, male and female, thus obviating any conflict. This argument has not been addressed by this Court in the Title VII/preemption context. The seminal Court of Appeals' decision rejecting this argument is *Homemakers, Inc. v. Division of Industrial Welfare,* 509 F.2d 20 (9th Cir. 1974), *cert denied,* 423 U.S. 1063 (1976). In arguing that California state law requiring special overtime premiums to be paid to women workers was not preempted by Title VII, the State contended "that the challenged statutes and orders presented no inevitable conflict with federal law, since Homemakers could comply readily with both federal and state requirements by extending the benefits of the premium overtime pay legislation to its male as well as to its female employees." 509 F.2d at 22. This argument had been rejected by the district court. In affirming, the Ninth Circuit noted: "Although such an interpretation might provide the consistency between the challenged statutes and federal law necessary for upholding the former, it would usurp the legislative power vested exclusively in the state." *Id.* The court recognized that the "extension" of state law to cover male employees would impose a sizeable economic burden on employers and that such a decision is legislative not judicial in nature. The same result was reached in *Burns v. Rohr Corp.,* 346 F. Supp. 994 (S.D. Cal. 1972). A state regulation requiring rest breaks for women was ruled invalid and was not extended to cover male employees as well. The court stated that "[a] federal court should not 'amend' the state's labor laws to obviate a conflict." *Id.* at 997.

D. Affirmative Action Principles Are Not Relevant To This Case.

In upholding the California pregnancy law, the Ninth Circuit incorrectly relied on *United Steelworkers v. Weber,* 443 U.S. 193 (1979). Under the circumstances there presented, this Court held that a voluntary race-conscious affirmative action plan did not violate Title VII. This case, however, is entirely different. At issue in *Weber* was the lawfulness under Title VII of a voluntary plan which (a) had the remedial purpose of eliminating the effects of past discrimination, (b) was temporary in nature, and (c) did not operate as an absolute bar to non-minorities. At issue in this case is the lawfulness under Title VII of *permanent* differential treatment of pregnancy. Simply put, the California pregnancy law requires true and unvarnished reverse discrimination; it is analogous not to a race-conscious affirmative action plan but to a state statute establishing a race-based classification under which black employees are to be permanently extended employment benefits not available to nonblack employees who are similarly situated. As this analysis makes clear, the *Weber* opinion does not support the Ninth Circuit's holding that sex-based classifications are lawful and enhance equal employment opportunity.

II

THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

In *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.,* 462 U.S. 669 (1983), this Court addressed for the first and only time to date the reach and proper interpretation of the PDA. The Court held that it is unlawful to exclude medical coverage for pregnancy from an otherwise comprehensive medical benefit package available to the spouses of employees. The Court found that, in enacting the PDA, Congress had disapproved the reasoning as well as the holding of *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976); it specifically noted that Congress had adopted the view of the *Gilbert* dissenters. Following the enactment of the PDA, it is thus appropriate to rely on the reasoning of the *Gilbert* dissenting opinions.

The California pregnancy law is analogous to the policy at issue in *Gilbert.* Both make distinctions between similarly situated disabled employees solely on the basis of pregnancy. In fact, the Ninth Circuit's reasoning is consistent with the reasoning of the *Gilbert* majority, that it is lawful to single out one disability—pregnancy—from all others and to treat that disability in a "special" manner because it is unique to women. The California pregnancy law, like the policy of the employer in *Gilbert,* results in differential terms and conditions of employment for similarly situated male and female employees.

Such a law is clearly unlawful under the reasoning of the Court in *Newport News:* "Thus, the dissenters [in *Gilbert*] asserted that the statute had been violated because conditions of employment for females were less favorable than for similarly situated males." 462 U.S. at 678. To be sure, the policy in *Gilbert* singled out pregnancy for disparate *less* beneficial treatment than other disabilities, while California law singles out pregnancy for disparate *more* beneficial treatment. In adopting the reasoning of the *Gilbert* dissenters, however,

Newport News invalidates both. The opinion of Justice Stevens in *Gilbert* is particularly relevant:

> Rather, the rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male. The analysis is the same whether the rule relates to hiring, promotion, the acceptability of an excuse for absence, or an exclusion from a disability insurance plan.

429 U.S. at 161-62 (footnote omitted) (Stevens, J., dissenting). Justice Brennan, joined by Justice Marshall, noted that in singling out pregnancy for special treatment, the employer in *Gilbert* had not singled out for special treatment risks unique to men or disproportionately experienced by men. That fact, Justice Brennan concluded, clearly demonstrated that the pregnancy-based classification was the product of "stereotypes and signals concerning the pregnant woman employee." *Id.* at 160 (Brennan, J., dissenting). The same is true in the instant case. The Court of Appeals' decision, then, is in direct conflict with *Newport News'* adoption of the principles of the *Gilbert* dissenters.

The Court of Appeals' holding that the PDA only prohibits discrimination *against* working women because the impetus for its enactment was concern over such discrimination is also in conflict with *Newport News* and the decisions of this Court. The Court in *Newport News* stated that such Congressional concern "does not create a 'negative inference' limiting the scope of the act to the specific problem that motivated its enactment." 462 U.S. at 679. Although Title VII itself was originally enacted in part because of Congressional concern that blacks were discriminated against on the basis of race, it protects whites as well

as blacks from discrimination. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-80 (1976). In holding that the male employees in *Newport News* had been discriminated against because female employees received preferential treatment, the Court concluded:

> By making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee's sex.
>
> . . . .
>
> The pregnancy limitation in this case violates Title VII by discriminating against male employees.

462 U.S. at 685.

In its brief to the Court in *Newport News*, the E.E.O.C. succinctly stated its view of controlling Title VII principles:

> As the most comprehensive federal fair employment statute ever enacted, Title VII invests in all workers, men as well as women, the right to be free of discriminatory treatment in the work place. It prohibits the employment of men, as well as women, under terms and conditions less favorable than those accorded similarly-situated members of the opposite sex and, conversely, forbids preferential treatment of women as well as men on the basis of their sex. Petitioner's position, that the PDA amendment of Title VII's definition of sex discrimination applies only to claims of women workers, would distort the fundamental anti-discrimination principles upon which Title VII is founded.

Brief of the E.E.O.C. in *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., reprinted in BNA's Law Reprints, Labor Law Series*, Volume 16, No. 25, 1982/83 Term, at 179.

The Ninth Circuit decision below also conflicts with this Court's decision in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). There, this Court held that, for the purposes of calculating retirement benefits, an employer cannot lawfully classify employees on the basis of sex in predicting longevity. Relying on its earlier decision in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), the Court concluded:

> "Congress has decided that classifications based on sex, like those based on national origin or race are unlawful." . . . The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute "[e]ven a true generalization about [a] class" cannot justify class-based treatment.

463 U.S. at 1084 (citations and footnote omitted).

Because the Ninth Circuit's endorsement of the sex-based preferential treatment mandated by the California pregnancy law is fundamentally inconsistent with this Court's recent decisions in *Newport News* and *Norris*, it should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals in this case.

DATED: September 18, 1985

Respectfully submitted,

ROBERT S. WARREN
WILLARD Z. CARR, JR.
THEODORE B. OLSON
*PAMELA L. HEMMINGER
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER

By PAMELA L. HEMMINGER
Pamela L. Hemminger

Attorneys for Petitioners California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce

* Counsel of Record

APPENDIX A

Published Opinion, 758 F.2d 390

California Federal Savings and Loan Association, etc.; Merchants and Manufacturers Association, etc.; California Chamber of Commerce, etc., Plaintiffs/Appellees, v. Mark Guerra, etc.; Department of Fair Employment and Housing; Cruz F. Sandoval, etc.; Fair Employment and Housing Commission of the State of California, Defendants/Appellants. Lillian Garland, Applicant for Intervention/Appellant. Nos. 84-5843, 84-5844. United States Court of Appeals, Ninth Circuit.

Argued and Submitted February 14, 1985. Decided April 16, 1985.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON and FERGUSON, Circuit Judges, and GILLIAM,*

FERGUSON, Circuit Judge:

California law requires employers covered by Title VII to grant pregnancy disability leave of up to four months to their employees. Cal. Gov't Code § 12945(b)(2).[1] Title VII prohibits employers from discriminating on the basis of sex. 42

---

* Hon. Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

[1] Cal. Gov't Code § 12945(b)(2) provides in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
>
> . . . .
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . .
>
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

(footnote continued on following page)

U.S.C. § 2000e-2(a).[2] This prohibition includes, by virtue of the Pregnancy Discrimination Amendment ("PDA"), discrimination on the basis of pregnancy. 42 U.S.C. § 2000e(k).[3] California Federal Savings and Loan Association ("Cal Fed") maintains a disability leave policy that is, on its face, gender-neutral. It fails, however, to afford to female employees California's statutorily required four-month pregnancy disability leave.[4]

(footnote continued from previous page)

Cal. Gov't Code § 12945(e) makes these provisions applicable to Cal Fed:

> (e) The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964.

[2] 42 U.S.C. § 2000e-2(a), Title VII of the Civil Rights Act of 1964, provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[3] The PDA, 42 U.S.C. § 2000e(k), added to Title VII in 1978, amends the definitions portion of the statute, and provides in relevant part:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

[4] The district court's finding of fact No. 7 described Cal Fed's disability leave policy. The court found, among the policy's provisions, the following:

> (a) An employee must have completed the third month of employment in order to be eligible [for disability leave].

(footnote continued on following page)

Lillian Garland was a receptionist/PBX operator with Cal Fed. From January to April 1982, she took a four-month pregnancy disability leave. In April, Cal Fed denied Garland's request for reinstatement to the same or similar job; Garland did not return to work at Cal Fed until November 1982. California's Department of Fair Employment and Housing therefore served Cal Fed with a complaint in May 1983. The Department alleged, on behalf of Garland, that Cal Fed's disability leave policy violated section 12945(b)(2) because it failed to provide Garland four months of pregnancy disability leave and reinstatement to the same or similar job.

Cal Fed then filed this suit in district court on August 1, 1983, seeking declaratory and injunctive relief against the enforcement of section 12945(b)(2) on the basis of preemption by federal antidiscrimination law—Title VII.[5] Cal Fed prevailed on cross-motions for summary judgment. The district court held that Title VII preempted section 12945(b)(2) because it "[d]iscriminat[es] against males based on pregnancy." The state defendants appeal this ruling.

Lillian Garland raises several other issues on appeal which do not go to the merits of the case. In this opinion, we address the merits; in a separate, unpublished memorandum disposition, filed concurrently with this opinion, we address the other issues, __ F.2d __.

(footnote continued from previous page)

> (b) [T]he position the employee is vacating may have to be filled. . . .
>
> (c) *Cal Fed reserves the right to terminate an employee on leave of absence if a similar and suitable position is not available.* . . .
>
> (Emphasis supplied.)

[5] Earlier in the lawsuit, Cal Fed dropped its additional claims for declaratory and injunctive relief against the enforcement of section 12945(b)(2) on the basis of ERISA preemption.

I.

We hold that the district court's conclusion that section 12945(b)(2) discriminates against men on the basis of pregnancy defies common sense, misinterprets case law, and flouts Title VII and the PDA.[6]

The district court relied only upon *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983), for the proposition that section 12945(b)(2) "[d]iscriminat[es] against males based on pregnancy." *Newport News* stands for no such thing. In deciding whether the protections of the PDA extended to the spouses of employees, the Supreme Court in *Newport News* actually held: "discrimination based on a *woman's* pregnancy is, on its face, discrimination because of *her* sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination *against female spouses* in

[6] It is unclear whether the district court sustained the employer's self-interested challenge to this state benefit *solely* on the basis of the employer's assertion of the supposed interests of third parties: male employees who did not challenge the statute. Cal Fed asserted, and the district court entertained, these interests without addressing whether assertion of the purported rights of third parties, who were never found incapable of protecting their own interests, may form the sole basis for a declaration of federal preemption. *Compare Barrows v. Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953) (allowing a "Caucasian" to challenge restrictive racial covenants on equal protection grounds by asserting the rights of "non-Caucasians" when the litigant also asserted monetary injury) *with Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576, 35 S. Ct. 167, 169, 59 L. Ed. 364 (1915) ("[Employer's] argument [against stripping employers of defense of contributory negligence by state statute] based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of."). Because it is unclear whether male employees' purportedly aggrieved interests formed the sole basis for its decision, and because the district court's finding of preemption is incorrect anyway, we need not decide this standing issue and the constitutional questions it raises. *See Barrows*, 346 U.S. at 255, 73 S. Ct. at 1034.

the provision of fringe benefits is also discrimination against male employees." 103 S. Ct. at 2631 (emphasis added). Thus, the employer in that case had to extend pregnancy benefits to make employees' wives' coverage equivalent in comprehensiveness to that of employees' husbands.

Citing *Newport News* for the rule that employers may disregard a state statutory obligation to provide pregnancy disability leave stands that case on its head. *Newport News* extended a pregnancy benefit, while Cal Fed seeks to limit one. *Newport News* measured equivalence of benefits by the comprehensiveness of their coverage of the disabilities to which each sex is subject, while Cal Fed seeks to measure equality of benefits by the sameness of coverage despite differences in need. *Newport News* found that inadequate pregnancy coverage discriminated against females—wives—and against their husbands only because the husbands-employees' total benefit package was thereby diminished, while Cal Fed claims that adequate pregnancy leave discriminates against male employees—who do not get pregnant and whose total disability package suffers no consequent diminution.

Newport News not only does not prohibit section 12945(b)(2), it provides a framework for harmonizing the California statute and the PDA. Within this framework, we first analyze the scope of Title VII's preemption; next, we discuss the effect of the PDA on employment discrimination law.

II.

The question this case presents is whether Title VII's prohibition of discrimination in employment on the basis of sex, as clarified by the definitional amendments of the PDA, preempts section 12945(b)(2). *See Newport News*, 103 S. Ct. at 2626-27. Our analysis starts with Title VII's preemption provisions, 42 U.S.C. § 2000e-7 and 42 U.S.C. § 2000h-4. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 2899-901, 77 L. Ed. 2d 490 (1983) (determining whether

ERISA preempted state disability law by first looking to ERISA's plain language and legislative history).

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an *unlawful* employment practice under this subchapter.

42 U.S.C. § 2000e-7 (emphasis supplied).

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is *inconsistent* with any of the purposes of this act, or any provision thereof.

42 U.S.C. § 2000h-4 (emphasis supplied).

The reach of Title VII's preemption provision is thus narrow. "Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII. . . ." *Shaw*, 103 S. Ct. at 2903. Title VII "preserve[s] the effectiveness of state antidiscrimination laws." *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1226 (9th Cir. 1971) (citing 110 Cong. Rec. 7243, 12721 (1964) (comments of Senators Case and Humphrey)). *Accord Burns v. Rohr Corp.*, 346 F. Supp. 994, 998 (S.D. Cal. 1972) ("the purpose of 42 U.S.C. §§ 2000e-7 and 2000h-4 was essentially to assure preservation of state anti-discrimination laws and not to save inconsistent laws.").

Does section 12945(b)(2) require an employment practice that is "unlawful" under, or "inconsistent" with, Title VII? This is a narrow inquiry. We need not determine, as the litigants would have us do, whether Title VII compels employers to grant reasonable pregnancy disability leave to protect women

from the potentially disparate impact of facially neutral, but inadequate, disability leave policies; we need only decide whether section 12945(b)(2) is permissible under Title VII. *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, ___ *U.S.* ___, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose from the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be."); *Hawaii Housing Authority v. Midkiff*, ___ U.S. ___, 104 S. Ct. 2321, 2328-31, 81 L. Ed. 2d 186 (1984) (examining the extent of a state's police powers). We need not determine whether some set of facts, which might show that the statute has harmed a woman's quest for employment, might render section 12945(b)(2) discriminatory as applied; we decide only a challenge to the facial validity of section 12945(b)(2) as presented by the district court's legal conclusion on cross-motions for summary judgment. We decline to conjure up a factual record (*compare Abraham v. Graphics Arts International Un* ., 660 F.2d 811 (D.C. Cir. 1981), with *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206, 213 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005, 1006 (8th Cir. 1983)), or to rely on possibly stereotypical assumptions. See *Califano v. Goldfarb*, 430 U.S. 199, 206-07, 97 S. Ct. 1021, 1026-27, 51 L. Ed. 2d 270 (1977). And, because section 12945(b)(2) deals with a condition that is unique to women —pregnancy disability rather than, say, parenting—our decision has no bearing on the lawfulness of state statutes or employment practices that classify on the basis of purportedly sex-linked factors that are actually less biological than stereotypical. *See*, Note, *Toward a Redefinition of Sexual Equality*, 95 Harv. L. Rev. 487, 508 (1981) (courts should "refus[e] to label [sexual] inequalities as natural, even when they may appear so"); Note, *Pink Collar Blues: Potential Hazards of Video Display Terminal Radiation*, 57 S. Cal. L. Rev. 139, 154-55 (1983) (legislative protections against hazards feared linked to pregnancy but not proven confined to pregnancy should be gender-neutral).

III.

Prior to the enactment of the PDA, the Supreme Court consistently upheld, against Title VII and equal protection challenges, employer plans that excluded pregnancy from disability coverage. In *Geduldig v. Aiello,* 417 U.S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974), the Court held that California's disability insurance program's exclusion of pregnancy does not violate the equal protection clause. In *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), the Court held that an employer's otherwise inclusive disability benefit plan that fails to include benefits for pregnancy does not violate Title VII, because discrimination on the basis of pregnancy is not discrimination at all. And in *Nashville Gas Co. v. Satty,* 434 U.S. 136, 143-46, 98 S. Ct. 347, 352-54, 54 L. Ed. 2d 356 (1977), the Court held that exclusion of sick leave pay to pregnant employees is not per se violative of Title VII.

Congress enacted the PDA specifically to change both the result of *Gilbert* and its "logic" that purposeful exclusion of pregnancy disability benefits did not amount to sex discrimination. *Newport News,* 103 S. Ct. at 2627. "The [PDA] makes clear that it is discriminatory to treat pregnancy-related conditions *less* favorably than other medical conditions." *Id.* 103 S. Ct. at 2631 (emphasis supplied).

In fact, the PDA's enactment showed that Congress sanctioned the expenditure of more dollars on medical coverage for female employees than for male in order to achieve equally complete health benefits for both. When the Supreme Court in *Newport News* extended to the wives of male employees medical coverage for pregnancy, it recognized that "[t]he cost of providing complete health insurance coverage for the dependents of male employees, including pregnant wives, might exceed the cost of providing such coverage for the dependents of female employees." 103 S. Ct. at 2632 n.26. It extended pregnancy coverage anyway. *See also* 29 C.F.R. § 1604.9(e) ("It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater

with respect to one sex than the other."); Note, *Sexual Equality Under the Pregnancy Discrimination Act,* 83 Colum. L. Rev. 690, 711-12 (1983) (legislative history to PDA and EEOC guidelines both endorse the pluralist concept that a cost differential may be necessary to equalize the burdens on reproduction).

Finally, the PDA did not demand that state law be blind to pregnancy's existence. This is the result compelled by the PDA's reversal of *Gilbert,* and its adoption of the *Gilbert* dissent, which concludes, in part, "A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies." *Gilbert,* 429 U.S. at 159, 97 S. Ct. at 420 (Brennan, J., dissenting). Attributing to Congress an intent that employers or states must ignore pregnancy completely when fashioning their disability policies would be as absurd as discovering a congressional intent that states or employers must completely ignore prostatitis on pain of violating Title VII.

Cal Fed claims that the PDA's second clause, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work," means that states and employers must ignore pregnancy. Because section 12945(b)(2) classifies, on its face, on the basis of pregnancy, Cal Fed concludes that the statute violates this clause of the PDA. Cal Fed, however, ignores the first clause of the PDA: " 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." By making "pregnancy" a substitute for "sex" in Title VII's antidiscrimination mandate, Congress procured for pregnancy that which it had already procured for sex: a guarantee against discrimination of all varieties, including facially neutral policies with a disparate impact. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971).

Cal Fed's argument highlights a tension between the PDA's first clause, which subjects pregnancy to the same types of discrimination analysis to which it subjects sex, and its second clause, which appears to demand pregnancy-neutral policies at all times. Cal Fed would resolve the tension in favor of blindness to pregnancy. We do not. *Newport News'* discussion of the reasons for the PDA's enactment, above, makes clear that Congress intended to reverse *Gilbert*, to require employers to include pregnancy disability leave in their otherwise comprehensive benefit packages, and thus to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise. *Newport News'* discussion of costs imposed by the PDA thus makes clear that Congress saw nothing inconsistent or unlawful about requiring greater dollar expenditures for women in order to achieve equally complete health care coverage for both sexes. We see no principled reason to distinguish pregnancy disability days, provided by section 12945(b)(2), from the pregnancy disability dollars in *Newport News*. There is no reason to distinguish *minimal* disability coverage provided by section 12945(b)(2) from the *maximal* disability coverage mandated by *Newport News* by stripping away the one substantive benefit that California's statute provides. Thus, we see nothing inconsistent or unlawful about section 12945(b)(2).

IV.

The PDA does not require states to ignore pregnancy. It requires that women be treated equally. As the preceding discussion shows, the PDA also provides a common-sense test of whether a policy—or a statute—affords equal treatment to women who are pregnant. The measure is whether the policy furthers "Title VII's prophylactic purpose of achieving 'equality of employment opportunities.'" *EEOC v. Puget Sound Log Scaling & Grading Bureau*, 752 F.2d 1389, 1392 (9th Cir. 1985) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429,

91 S. Ct. 849, 852, 28 L. Ed. 2d 158 (1971)). Thus, equality under the PDA must be measured in employment opportunity, not necessarily in amounts of money expended—or in amounts of days of disability leave expended. Equality in the disability context compares coverage to actual need, not coverage to hypothetical identical needs.

It necessarily follows that Title VII does not preempt a state law that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with, nor unlawful under, Title VII. The number of days guaranteed, like the number of dollars expended, is a means to the goal of employment opportunity.[7]

The decision of the district court is REVERSED and the case is REMANDED with instructions to grant summary judgment in favor of the state defendants.

---

[7] We are not the first court to announce that the goal of Title VII is equality of employment opportunity, not necessarily sameness of treatment. *See United Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979) (Title VII does not forbid private employers and unions to adopt affirmative action plans); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S. Ct. 849, 852, 28 L. Ed. 2d 158 (1971) (the disparate impact of facially neutral employment policies "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); *La Riviere v. EEOC*, 682 F.2d 1275, 1279-80 (9th Cir. 1982) (government may adopt affirmative action plans).

APPENDIX B

MEMORANDUM*

United States Court of Appeals for the Ninth Circuit, Nos. 84-5843, 84-5844

California Federal Savings and Loan Association, etc.; Merchants and Manufacturers Association, etc.; California Chamber of Commerce, etc., Plaintiffs/Appellees, v. Mark Guerra, etc.; Department of Fair Employment and Housing; Cruz F. Sandoval, etc.; Fair Employment and Housing Commission of the State of California, Defendants/Appellants. Lillian Garland, Applicant for Intervention/Appellant.

Appeal from the United States District Court for the Central District of California, Manuel Real, Chief Judge, Presiding, D.C. No. CV 83-4927-R.

Argued and Submitted February 14, 1985.
Filed April 16, 1985

Before: PREGERSON and FERGUSON, Circuit Judges, and GILLIAM,**

This case presents the substantive issue of whether Title VII of the Civil Rights Act and its Pregnancy Discrimination amendment, 42 U.S.C. § 2000e-2(a) and § 2000e(k), preempt California's pregnancy disability leave statute, Cal. Gov't Code § 12945(b)(2), and other procedural and jurisdictional issues. We deal with the merits of this case in a published opinion filed simultaneously with this memorandum. In this disposition, we address the procedural and jurisdictional issues.

---

* This panel has concluded that the issues presented by this portion of the appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

** Hon. Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

1. **Jurisdiction**

Appellant Lilian Garland claims that the district court lacked subject matter jurisdiction over the complaint. This contention lacks merit. A complaint seeking only declaratory relief against the enforcement of state law on the basis of federal preemption would fail to state federal subject matter jurisdiction, *Miller-Wohl Co. v. Commissioner of Labor & Industry, State of Wisconsin,* 685 F.2d 1088 (9th Cir. 1982); Cal Fed's complaint, however, seeks both injunctive and declaratory relief. The district court therefore properly exercised jurisdiction. *Shaw v. Delta Air Lines, Inc.,* 103 S. Ct. 2890, 2899 n.14 (1983); *Southern Pacific Transportation Co. v. Public Utilities Commission,* 716 F.2d 1285, 1288 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1904 (1984).

2. **Intervention**

Garland sought to intervene in this litigation pursuant to Fed. R. Civ. P. 24(a)(2), which provides for timely intervention as of right when the applicant demonstrates: an interest; the potential impairment of her ability to protect her interest; inadequate protection of her interest by the existing parties; and a timely application. *County of Fresno v. Andrus,* 622 F.2d 436, 438 (9th Cir. 1980). The district court denied Garland's motion on three grounds: "(1) the motion is untimely, (2) Garland lacks a direct and substantial interest in the subject matter of this litigation, and (3) her interests are adequately represented by the defendants."

We review the district court's decision on the timeliness factor for abuse of discretion. *NAACP v. New York,* 413 U.S. 345 (1973). Because we find no abuse of discretion in the district court's decision that Garland's post-judgment motion to intervene was untimely, we express no opinion on the district court's decision on the other two factors.

Timeliness is a flexible criterion, *Blake v. Pallon,* 554 F.2d 947, 951-52 (9th Cir. 1977), "to be determined from all the circumstances." *NAACP v. New York,* 413 U.S. 345, 366 (1973).

> We weigh three factors to determine timeliness: the stage of the proceedings at which an applicant seeks to intervene, the reason for and length of the delay, and whether the parties would suffer prejudice. . . . Our focus is on the date the [party seeking intervention] should have been aware its interest would not be protected adequately by the parties, not the date it learned of the litigation.

Shelter Framing Corp. v. Pension Benefit Guaranty Corp., 705 F.2d 1502, 1508 (9th Cir. 1983).

Under this test, Garland sought to intervene late in the litigation—after judgment was entered. This tends to make the motion untimely. The district court, however, made no finding of prejudice, a criterion "most important" to timeliness. *United States v. Oregon,* 745 F.2d 550, 552 (9th Cir. 1984). This favors the timeliness of the intervention.

The crucial question, thus, is when Garland should have "been aware [her] interest would not be protected." Garland claims that the date on which she learned that the existing parties would not adequately protect her interest was March 21, 1984, when the district court entered judgment. After that date, when appeal became necessary, Garland claims that the state's representation first became inadequate: the state failed to consider Garland's interest in deciding whether, and what, to appeal; and the state failed to appeal the jurisdiction and exhaustion issues.

Post-judgment intervention is not necessarily untimely. For example, in *United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977), the Supreme Court allowed a stewardess to intervene after judgment in a lawsuit challenging an airlines' rule that its female flight attendants must remain unmarried. The Court based its decision, however, on the fact that only

with a final judgment did the district court's earlier denial of class certification, which effectively extinguished plaintiff's claim, become appealable. "The critical fact here is that once the final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation." 432 U.S. at 394. The Court might have held otherwise "if the respondent had sought to intervene in order to join the named plaintiffs in litigating her individual claim based on the illegality of United's no-marriage rule. . . . But the motion to intervene in this case was for a wholly different purpose." *Id.* at 392.

Garland does not intervene for such a "wholly different purpose." She seeks intervention to litigate the merits, the jurisdiction, and the exhaustion issues. Her interest in these issues has undergone no substantial change between the start of the litigation and the entry of judgment. Garland should have "been aware" of any claimed inadequacy in the state's representation earlier. Thus, there was no reason to justify the "length of the delay."

We affirm the denial of the motion to intervene; we therefore do not address Garland's argument that the district court erred in failing to force Cal Fed to exhaust administrative remedies.

APPENDIX C

Order

United States Court of Appeals for the Ninth Circuit. Nos. 84-5843, 84-5844, D.C. No. CV 83-4927-R. California Federal Savings and Loan Association, etc.; Merchants and Manufacturers Association, etc.; California Chamber of Commerce, etc., Plaintiffs-Appellees, v. Mark Guerra, etc.; Department of Fair Employment and Housing; Cruz F. Sandoval, etc.; Fair Employment and Housing Commission of the State of California, Defendants-Appellants. Lillian Garland, Applicant for Intervention-Appellant.

Filed: May 7, 1985.

Before: PREGERSON and FERGUSON, Circuit Judges, and GILLIAM,* District Judge.

The opinion filed on April 16, 1985 is amended as set forth below.

Footnote 6 is amended to read as follows:

> The plaintiffs asserted that § 12945(b)(2) "has caused, and unless enjoined by this Court, will continue to cause, plaintiffs undue hardship and irreparable injury for which plaintiffs have no adequate remedy at law." Complaint ¶ 27. These injuries include state civil and criminal penalties and substantial economic harm. *See, e.g.*, Complaint ¶ 27; Brief of Appellees at 48-51; Stipulated Findings of Fact ¶ 12, 21; District Court Findings of Fact Nos. 12, 21; District Court Conclusion of Law No. 8. Thus, plaintiffs asserted their own legal and business interests in challenging the statute, despite the fact that the District Court, in finding that § 12945(b)(2) discriminates against men, rested its decision at least in large part on the purported interests of third parties: male employees who did not challenge the statute. *See, e.g.*, District Court Conclusions of Law Nos. 3-5.

---

* Hon. Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX D

Order.

United States Court of Appeals for the Ninth Circuit, Nos. 84-5843, 84-5844, D.C. No. CV 83-4927-R. California Federal Savings and Loan Association, etc.; Merchants and Manufacturers Association, etc.; California Chamber of Commerce, etc.; Plaintiffs/Appellees, v. Mark Guerra, etc.; Department of Fair Employment and Housing; Cruz F. Sandoval, etc.; Fair Employment and Housing Commission of the State of California, Defendants/Appellants. Lillian Garland, Applicant for Intervention/Appellant.

Filed: June 21, 1985.

Before: PREGERSON and FERGUSON, Circuit Judges, and GILLIAM,* District Judge.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Pregerson and Ferguson voted to reject the suggestion for a rehearing en banc and Judge Gilliam recommended the denial of the en banc suggestion.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* Hon. Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX E

CALIFORNIA FED. S & L ASSN. v. GUERRA

U.S. District Court, Central District of California

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, MERCHANTS AND MANUFACTURERS ASSOCIATION, and CALIFORNIA CHAMBER OF COMMERCE v. GUERRA, as Director of the Department of Fair Employment and Housing, et al., and FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA, No. 83-4927 R, March 21, 1984.

REAL, District Judge: The motion of plaintiffs California Federal Savings and Loan Association, Merchants and Manufacturers Association, and the California Chamber of Commerce for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure came on regularly for hearing on March 19, 1984, in the United States District Court, before the honorable Manuel L. Real, Judge Presiding.

After full consideration of the moving and responding papers, all supporting papers and exhibits, the file in this case, and the oral argument of counsel, the Court finds that there is no triable issue of material fact and that plaintiffs are entitled to summary judgment as a matter of law granting the following declaratory and injunctive relief.

In accordance with the Statement of Uncontroverted Facts and the Conclusions of Law filed herein,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That California law codified at California Government Code Section 12945(b)(2), which requires preferential treatment of females disabled by pregnancy, childbirth or related medical conditions, is declared preempted by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (hereafter "Title VII") is declared

null, void, invalid and inoperative under the Supremacy Clause of the U.S. Constitution to the extent that state law requires "employers" under Title VII to reinstate employees returning from a disability leave on account of pregnancy, childbirth or related medical conditions to the same or similar job, to the extent that state law requires "employers" under Title VII to hold open or to utilize temporary employees to fill the job held by an employee on a disability leave on account of pregnancy, childbirth or related medical conditions and to the extent that state law requires "employers" under Title VII to provide a reasonable disability leave of up to four months to employees disabled by pregnancy, childbirth or related medical conditions.

2. That California law as interpreted and enforced by defendants and defendants' policies of interpretation and enforcement including proposed regulation 7291.2 and the decisions in Department of Fair Employment and Housing v. Travel Express and Department of Fair Employment and Housing v. Hyman-Goldberg dba Dyn-Aura Engineering Laboratories are declared preempted by Title VII and are declared null, void, invalid and inoperative under the Supremacy Clause of the U.S. Constitution to the extent that they require "employers" under Title VII to reinstate employees returning from a disability leave on account of pregnancy, childbirth or related medical conditions to the same or similar job, to the extent that they require "employers" under Title VII to hold open or utilize temporary employees to fill the job held by an employee on disability leave on account of pregnancy, childbirth or related medical conditions and to the extent that they require "employers" under Title VII to provide a reasonable disability leave of up to four months to employees disabled by pregnancy, childbirth or related medical conditions.

3. That the defendants be and hereby are permanently enjoined from administering, implementing or enforcing California Government Code Section

12945(b)(2) and defendants' policies of interpretation and enforcement to the extent that they require employers to reinstate employees returning from a disability leave on account of pregnancy, childbirth or related medical conditions to the same or similar job, to the extent that they require employers to hold open or utilize temporary employees to fill the job held by an employee on disability leave on account of pregnancy, childbirth or related medical conditions and to the extent that they require "employers" under Title VII to provide a reasonable disability leave of up to four months to employees disabled by pregnancy, childbirth or related medical conditions against plaintiff California Federal Savings and Loan Association and the members of plaintiffs Merchants and Manufacturers Association and/or the California Chamber of Commerce who are "employers" under Title VII.

4. That the defendants be and hereby are permanently enjoined from proceeding to conduct a hearing on the accusation issued on behalf of Lillian Garland or any other accusation issued against any member of plaintiffs Merchants and Manufacturers Association and/or the California Chamber of Commerce which is an "employer" under Title VII based on the employer's failure to reinstate an employee following a disability leave on account of pregnancy, childbirth or related medical conditions, based on the employer's failure to hold open or utilize temporary employees to fill the job held by an employee on disability leave on account of pregnancy, childbirth or related medical conditions, or based on the employer's failure to provide a reasonable leave of up to four months to an employee disabled by pregnancy, childbirth or related medical conditions.

PLAINTIFFS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW SUBMITTED PURSUANT TO LOCAL RULE 7.14.1.

Plaintiffs California Federal Savings and Loan Association, Merchants and Manufacturers Association, and the California Chamber of Commerce hereby submit the following Statement of Uncontroverted Facts and Conclusions of Law pursuant to Local Rule 7.14.1:

UNCONTROVERTED FACTS

The following facts have been stipulated to by the parties and are not controverted. The original Stipulated Findings of Fact executed by the parties through their counsel of record on February 9, 1984, has been lodged concurrently with the filing of the Summary Judgment Motion.

1. Plaintiff California Federal Savings and Loan Association ("Cal Fed"), a federally chartered savings and loan association, is a diversified financial services organization engaged principally in savings and loan operations in California, Florida, Georgia and Nevada. The corporate headquarters of Cal Fed are located in Los Angeles within the Central District of California. Cal Fed regularly employs more than 15 employees and is engaged in an industry affecting interstate commerce and, therefore, is an employer within the meaning of both Government Code section 12926(c) of the California Fair Employment and Housing Act ("FEHA") and 42 U.S.C. § 2000e(b) of the Civil Rights Act of 1964, as amended ("Title VII").

2. Plaintiff Merchants and Manufacturers Association ("M&M") is a nonprofit California corporation with its principal office located in Los Angeles, California. M&M is a trade association and represents approximately 2,650 employers throughout the State of California. Cal Fed is a member of M&M. Consistent with its function and purpose as a trade association, M&M (a) advises its members of relevant state and federal legislative and judicial developments, including day-to-day advice on labor relations matters; (b) appears on behalf of its members before local, state and federal legislative bodies; (c) sponsors educational seminars and commissions

publications designed to inform its members of their obligations under state and federal laws; and (d) when necessary, initiates proceedings in state and federal courts to protect the interests of its members.

3. Plaintiff California Chamber of Commerce (the "Chamber") is a non-profit California corporation with its principal office located in Sacramento, California. The Chamber is a statewide chamber. Over 4,300 business entities throughout California are members of the Chamber. Cal Fed is a member of the Chamber. Consistent with its functions and purposes as a chamber of commerce, the Chamber (a) advises its members of relevant state and federal legislative and judicial developments relevant to the business community; (b) appears on behalf of its members before local, state and federal legislative bodies; (c) sponsors educational seminars and commissions publications designed to inform its members of their obligations under state and federal law; and (d) when necessary, initiates proceedings in state and federal courts to protect the interests of its members.

4. Defendant Fair Employment and Housing Commission of the State of California (the "Commission") is a statewide agency created by the Legislature of the State of California under Government Code section 12903. The functions, powers and duties of the Commission are set forth in Government Code section 12935 and include the following: to adopt, promulgate, amend and rescind suitable rules, regulations and standards which interpret, implement and apply the FEHA; to conduct and regulate hearings on accusations brought against employers who allegedly have violated the FEHA; and to hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the Commission. Defendant Cruz F. Sandoval is the Chair Commissioner of the Fair Employment and Housing Commission.

5. Defendant Department of Fair Employment and Housing (the "Department") is a statewide agency created by the Legislature of the State of California under Government Code section 12901. The functions, powers and duties of the Department are set forth in Government Code section 12930 and include the following: to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the functions and duties of the Department; to receive, investigate and conciliate compliants; to issue accusations against employers charging them with violations of the FEHA; and to prosecute such accusations before the Commission. Defendant Mark Guerra is the Director of the Department of Fair Employment and Housing and administers and directs the Department.

6. Cal Fed has a leave of absence program for its employees including leaves for bereavement, disability, jury duty and pregnancy/childbirth disability, among others.

7. According to Cal Fed's written leave of absence policy, the following provisions apply to both disability and pregnancy/childbirth leaves:

(a) An employee must have completed the third month of employment in order to be eligible.

(b) To ensure continuous workflow, the position the employee is vacating may have to be filled. If this happens, the Personnel Division will make every effort to provide another, similar and suitable position. Under no circumstances may an employee return before contacting the Employment Department to find out whether a position is available.

(c) Cal Fed reserves the right to terminate an employee on leave of absence if a similar and suitable position is not available.

(d) Cal Fed reserves the right to terminate an employee on leave of absence if the employee fails to contact a member of the Employment Department on or before the leave's expiration date.

(e) If an employee's leave of absence exceeds 30 days, the following benefits are affected and time adjustments made:

(1) Anniversary date;

(2) Emergency leave time accrual;

(3) Insurance;

(4) Retirement;

(5) Salary review date; and

(6) Vacation accrual.

(f) Vacation time, holidays and other benefits do not accrue during the leave of absence. When the leave exceeds 30 days, the employee has the option to be paid for any unused vacation time accrued. However, if the employee elects this option and returns to work, vacation time accrual will begin again on the date of return to work.

8. M&M and the Chamber have members, engaged in interstate commerce and employing 15 or more employees, who have pregnancy disability leave policies/programs which have similar provisions to Cal Fed's leave of absence policy in that the policies/programs (1) do not provide for an immediate reinstatement right to a pregnant female at the conclusion of her disability leave or to employees returning from other disability leaves; (2) do not provide for the accrual of all benefits during the term of pregnancy leave or during the term of other disability leaves; and (3) provide that employees are not entitled to disability leaves, including a pregnancy disability leave, until the employee has completed a probationary period.

9. Plaintiff Cal Fed currently sponsors and administers numerous employee benefit plans including a medical plan, a salary continuance program to be utilized in the event of disability and a retirement plan. These plans are "employee benefit plans" within the meaning of ERISA, 29 U.S.C.

§ 1002(3), and plaintiff Cal Fed is a "fiduciary" of the respective plans within the meaning of section 3(21)A of ERISA, 29 U.S.C. § 1002(21)(A).

10. Lillian D. Garland, a receptionist/PBX operator employed at Cal Fed, commenced a pregnancy/childbirth disability leave on or about January 18, 1982. Her position was filled with a permanent replacement. On or about April 20, 1982, Ms. Garland notified Cal Fed that she was able to return to work, but was advised by Personnel that there were no receptionist or similar positions available at that time. On or about November 17, 1982, Ms. Garland accepted an offer of a receptionist position in the Accounting Department and returned to work at Cal Fed on or about November 22, 1982.

11. On or about May 2, 1983, the Department caused to be served on Cal Fed, on behalf of Lillian D. Garland, complainant, an accusation in the name of the Department, alleging that Cal Fed violated the California Fair Employment and Housing Act for the reasons set forth in paragraphs 4 through 10 of said accusation, a true and correct copy of which appears in Cal Fed's Motion For Preliminary Injunction, Exhibit 3, at pages 81-84. On or about May 2, 1983, the Commission served written notice on Cal Fed that a hearing would be held before the Commission upon the charges made in the accusation. Said hearing was scheduled for September 15-16, 1983.

12. In the accusation, the Department seeks damages on behalf of Ms. Garland and an order from the Commission that Cal Fed be compelled to change and to conform its pregnancy/childbirth disability leave policy to the requirements of Government Code section 12945(b)(2) ("section 12945 (b)(2)").

13. In 1980, the Department directed and authorized the preparation of a pamphlet entitled "Questions and Answers on Pregnancy." This pamphlet was distributed to the public from

1980 through October 1983 to provide guidance to employers in complying with section 12945(b)(2) and includes the following questions and answers:

> "3. Q. Does an employer have to keep the employee's job open while she is on four month pregnancy leave?
>
> A. The employer must assign the woman who has taken a pregnancy leave to her same or similar job upon return. However, if her absence is longer than the employer's policy permits or in excess of four months, whichever is greater, the employer may fill her previously-occupied job.
>
> • • • •
>
> "11. Q. Must a pregnant employee be returned to the same job as a secretary even though disabled male and other female workers in the factory must take whatever job is open?
>
> A. Yes.
>
> • • • •
>
> "26. Q. Is a probationary employee entitled to pregnancy benefits if other temporarily disabled probationary employees receive none?
>
> A. Yes. A probationary employee is entitled to a leave of absence of up to four months if she becomes disabled because of her pregnancy. But the employer is not required to pay her benefits while she is on leave if other temporarily disabled probationary employees receive no benefits. When her pregnancy-related disabilities cease, the employee must be permitted to return to her same or similar job and resume her probationary status."

14. The pamphlet prepared by the Department in 1980 entitled "Questions and Answers on Pregnancy" is not being used by the Department in fulfilling its enforcement responsibilities under the FEHA and is no longer being distributed to the public.

15. The Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcement of Title VII, has issued Sex Discrimination Guidelines including "Questions and Answers On The Pregnancy Discrimination Act" to provide guidance to employers in complying with Title VII. Question and Answer No. 9 is as follows:

> "9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?
>
> A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons." (29 C.F.R. Part 1604 (Appendix.))"

16. The Commission issued its decision in The Matter of the Accusation of the Department of Fair Employment and Housing v. Travel Express, on August 4, 1983. This decision is a precedential decision adopted pursuant to California Government Code section 12935(h) to "serve as precedent in interpreting and applying [the FEHA]." In that decision, the Commission states that:

> "Employees on temporary disability have a right to return to their same or similar position if the period of pregnancy disability does not exceed four months. (Section 12945(b)(2) . . . .)" (Travel Express, Case No. FEP 80-81 A7-0992s.)

17. The document, a copy of which is attached hereto as Exhibit A, is a true and correct copy of the Commission's Proposed Regulation section 7291.2, "Pregnancy, Childbirth or Related Medical Conditions" (hereinafter "Proposed Regulation § 7291.2") adopted by the Commission on January 6, 1984.

18. Proposed Regulation § 7291.2 sets forth the Commission's interpretation of Government Code section 12945(b)(2).

19. The Department is interpreting section 12945(b)(2) in a manner consistent with Proposed Regulation § 7291.2 in fulfilling its statutory responsibilities under the FEHA.

20. Defendants interpret section 12945(b)(2) in the following manner, *inter alia*:

> a. It is not a violation of section 12945(b)(2) if employees on disability leave on account of pregnancy, childbirth or related medical conditions do not accrue benefits and/or service credit toward benefits under health and welfare benefit plans and retirement plans as defined in ERISA if employees on disability leaves on account of other medical conditions do not accrue benefits and/or service credit toward benefits.
>
> b. It is not a violation of section 12945(b)(2) if employees are required to complete a three-month probationary period in order to be eligible for disability leave on account of pregnancy, childbirth or related medical conditions if employees who take disability leaves on account of other medical conditions are required to complete a three-month probationary period in order to be eligible for such leaves.
>
> c. It is not a violation of section 12945(b)(2) if an employee on disability leave on account of pregnancy, childbirth or related medical conditions is required to contact a member of an employment (personnel) department on or before the expiration date of the leave if

employees returning from other disability leaves have the same requirement.

21. The Department accepts all complaints alleging pregnancy discrimination pursuant to section 12945(b)(2) brought by employees residing in the State of California, including complaints alleging denial of a four-month disability leave on account of pregnancy, childbirth or related medical condition and complaints alleging denial of reinstatement to the original or substantially similar position within a reasonable period of time following such leave.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this action under 28 U.S.C. §§ 1331 and 1337 because this action arises under the Constitution and the laws of the United States.

2. California Government Code Section 12945(b)(2) and defendants' policies of interpretation and enforcement require "employers" under Title VII to extend employment rights to female employees disabled by pregnancy, childbirth or related medical conditions even if those employment rights are not given to employees disabled by other medical conditions.

3. To the extent that California Government Code Section 12945(b)(2) requires "employers" under Title VII to reinstate employees returning from a disability leave on account of pregnancy, childbirth, or related medical conditions to the same or similar job and requires "employers" under Title VII to hold open or utilize temporary employees to fill the job held by an employee on disability leave on account of pregnancy, childbirth, or related medical conditions, state law requires preferential treatment for female employees.

4. The Commission's decisions in Travel Express and Dyn-Aura Engineering Laboratories which declare that employees on disability leaves on account of pregnancy, childbirth, or

related medical conditions have a right to return to their same or similar position if the period of the leave does not exceed four months require preferential treatment for female employees. California Government Code Section 12945(b)(2) requires employers covered under Title VII to grant employees disabled by pregnancy, childbirth or related medical conditions a leave of absence of up to four months. The Commission has stated in its decision in Dyn-Aura Engineering Laboratories that "the right to pregnancy leave necessarily includes the right to return to work." The requirement of a four month leave of absence thus requires preferential treatment because preferential reinstatement rights constitute preferential treatment.

5. The regulations adopted by the Commission and enforced by the Department as policies of interpretation and enforcement which require "employers" under Title VII to reinstate employees returning from a disability leave on account of pregnancy, childbirth, or related medical conditions to the same or a similar position and which require "employers" under Title VII to hold open or utilize temporary employees to fill the job held by an employee on a disability leave on account of pregnancy, childbirth, or related medical conditions require preferential treatment for female employees.

6. An employer's leave of absence policy which provides that women affected by pregnancy, childbirth or related medical conditions are treated the same for all employment-related purposes, including reinstatement, as other persons not so affected but similar in their ability or inability to work complies with Section 701(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(k). EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1004.10(b) [sic]; EEOC Questions and Answers on the Pregnancy Discrimination Act, Questions and Answers No. 9, 29 C.F.R. Part 1604 (Appendix).

7. State law which is inconsistent with, conflicts with or permits conduct unlawful under Title VII is preempted under the Supremacy Clause of the United States Constitution and 42 U.S.C. §§ 2000e-7 and 2000h-4.

8. A conflict between state and federal law mandating federal preemption occurs where an employer cannot comply with both federal and state law or where the state law is inconsistent with the purpose of the federal law. Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, ___ U.S. ___, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983); Ray v. Atlantic Richfield Co., 435 U.S. 151, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978).

9. State law requiring an employer to give females disabled by pregnancy, childbirth, or related medical conditions preferential reinstatement rights at the conclusion of a disability leave or requiring an employer to hold open or utilize temporary employees to fill the job held by an employee on disability leave due to pregnancy, childbirth, or related medical conditions is inconsistent with the purpose of Congress in enacting the Pregnancy Discrimination Amendment to eliminate classifications based on pregnancy and with the purpose of Title VII to provide equal treatment for males and females.

10. Discrimination against males based on pregnancy is discrimination based on sex under Title VII. California employers who comply with state law are subject to reverse discrimination suits under Title VII brought by temporarily disabled males who do not receive the same treatment as female employees disabled by pregnancy, childbirth or related medical conditions. Newport News Shipbuilding and Dry Dock Company v. EEOC, 462 U.S. ___, 77 L. Ed. 2d 89, 103 S. Ct. 2622, 32 FEP Cases 1 (1983).

11. State law which mandates preferential treatment for female employees disabled by pregnancy, childbirth, or related medical conditions conflicts with Title VII and an employer need not extend the preferential treatment to all similarly situated employees. It is not the function of federal courts to rewrite state law which conflicts with federal law. Homemakers, Inc. v. Division of Industrial Welfare, 509 F. 2d 20, 10 FEP Cases 633 (9th Cir. 1974), cert. denied, 423 U.S. 1063, 11 FEP Cases 1449 (1976).

12. California state law and the policies of interpretation and enforcement as set forth in paragraphs 3 through 5 above which require preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions are preempted by Title VII and are null, void, invalid and inoperative under the Supremacy Clause of the United States Constitution.

EXHIBIT A

7291.2 Pregnancy, Childbirth or Related Medical Conditions. These regulations on pregnancy, childbirth or related medical conditions represent the Commission's interpretation of Government Code sections 12940, 12943 and 12945, as well as its incorporation of previous pronouncements under section 12940 on discrimination on the basis of pregnancy, childbirth or related medical conditions, consistent with Congressional recognition that discriminatory treatment on account of pregnancy, childbirth or related medical conditions constitutes sex discrimination. (Section 701(k) of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. 2000e(k).)

(a) Sex discrimination, as it is prohibited in section 12940, includes discrimination against an individual because of her pregnancy, childbearing or related medical conditions.

(b) Definitions: As used in this section, the following definitions apply:

(1) "Disability on Account of Pregnancy, Childbirth or Related Medical Conditions." An applicant's or employee's inability to perform the job in question in the usual manner due to pregnancy, childbirth or related medical conditions.

(2) "Related Medical Conditions." Medical conditions related to pregnancy or childbirth and not to any

health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, as defined in Government Code section 12925(f).

(3) "Normal Pregnancy." A pregnancy which is not certified as abnormal by a licensed physician.

(4) "Accrued leave." An employer policy of permitting employees to be absent from work, with monetary compensation, because of sickness or other temporary disability.

(5) "Non-Title VII Employer." An employer, as defined in Government Code section 12925(c), with five to fourteen employees, not covered by section 701(k) of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. 2000e(k).

(6) "All Employers." Non-Title VII employers and employers covered by section 701(k) of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. 2000e(k).

(7) "Original or Substantially Similar Job." An employee who has taken a leave or been transferred to different job duties because of pregnancy, childbirth, or related medical conditions must be returned to the original job with the same pay, working conditions, benefits and opportunities for advancement unless that position is no longer available due to business necessity. There is a rebuttable presumption that a woman's job while on leave due to pregnancy, childbirth, or related medical conditions can be left open or filled by a temporary employee. If the job is no longer available, an employer must make a reasonable, good faith effort to return the employee to a substantially similar job. Substantially similar job is defined as one of equal pay and benefits which is performed under similar working conditions, and provides similar opportunities for advancement.

(8) "Affected by Pregnancy, Childbirth or Related Medical Conditions." An employee who is experiencing

the effects of pregnancy, childbirth or related medical conditions and who may or may not be disabled by these physical conditions.

(c) Leaves: In general, it is unlawful for an employer to refuse to treat pregnancy, childbirth or related medical conditions in the same manner as any other temporary disability for purposes of paid or unpaid disability leave or leaves of absence. An employee disabled on account of pregnancy, childbirth or related medical conditions is entitled to take a leave of the same duration and upon the same terms, including eligibility period for the leave, as are available to other temporarily disabled employees. Government Code sections 12943 and 12945 recognize, however, that a facially neutral employment policy under which unduly restrictive, insufficient or no leave is available will have an adverse impact on women affected by pregnancy, childbirth or related medical conditions. These sections thus provide provisions to insure that women affected by pregnancy, childbirth or related medical conditions have equal employment opportunities as persons not so affected.

(1) For non-Title VII employers, who have a temporary leave policy providing more than six weeks' paid leave for other employees, the following rule applies: An employer must only provide up to six weeks' paid leave for women who are affected by normal pregnancy, childbirth or related medical conditions, but on the same terms as such leave time is granted to other employees. If a woman is disabled by pregnancy, childbirth or related medical conditions for a period exceeding six weeks, her disability shall be treated the same as all other temporary disabilities; the six week limit does not apply.

(2) For all employers the following rules apply:

(A) An employer may require any employee who plans to take a leave on account of pregnancy, childbirth or related medical conditions to give the employer reasonable notice of the date the leave will commence and the estimated duration of leave.

(1) The employer shall give employees reasonable notice of this requirement.

(2) An employee shall not be required to provide notice of the intended leave until such time as she can ascertain with reasonable certainty the expected date that the leave will commence.

(B) The employee shall notify the employer as soon as she is ready and able to return to work. Unless pursuant to a bona fide occupational qualification or business necessity, the employer shall reinstate the returning employee to her original or a substantially similar job, as defined in section 7291.2(b)(7), within a reasonable period of time. There is a rebuttable presumption that a reasonable period of time is no later than two weeks from the date of the employee's notification.

(C) Unless pursuant to a bona fide occupational qualification or business necessity, any employer who has a temporary disability leave policy or a leave of absence policy which provides for less than a four month leave, shall make available, leave time totaling up to four months, whether paid and/or unpaid leave (as provided below), to employees who are disabled on account of pregnancy, childbirth or related medical conditions.

(1) An employee disabled on account of pregnancy, childbirth or related medical conditions shall be entitled first to utilize the full amount of her accrued paid leave prior to commencing the remaining portion of the four months' leave.

(2) An employee may also utilize any accrued vacation time or other paid leave during

the otherwise unpaid remaining portion of the four months' leave.

(3) If an employee has taken a leave on account of pregnancy, childbirth or related medical conditions for up to four months and the leave is in excess of the employer's temporary disability leave or other leave policy, upon her return she may not be penalized with respect to working conditions, benefits, opportunities for advancement or loss of pay.

(4) Notwithstanding the provisions in section 7291.2(c)(2)(C)(3) above, an employee who has taken a leave on account of pregnancy, childbirth or related medical conditions shall accrue seniority and other benefits in the same manner as other temporarily disabled employees.

(D) It is unlawful for an employer to require a pregnant employee to take a mandatory leave on account of pregnancy, childbirth or related medical conditions prior to her determination that she is unable to perform the job in question due to pregnancy, childbirth or related medical conditions unless pursuant to a bona fide occupational qualification.

(d) Transfer to Less Hazardous or Strenuous Positions.

(1) In the absence of a policy, practice, or collective bargaining agreement regarding transfers for temporarily disabled employees, it is unlawful for a non-Title VII employer to refuse to transfer a pregnant employee to a less hazardous or strenuous position for the duration of the pregnancy provided that:

(A) The pregnant employee requests the transfer;

(B) The pregnant employee's request is based on the advice of her physician; and

(C) Such transfer can be reasonably accommodated by the employer. No employer is required to create additional employment which would not otherwise be created, discharge another employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the job.

(2) For all employers:

(A) It is unlawful for an employer to deny the request of a pregnant employee to transfer to a less hazardous or strenuous position when an employer has a policy, practice, or collective bargaining agreement which requires or authorizes the transfer of a temporarily disabled employee to a less hazardous or strenuous position for the duration of the disability.

(B) If a pregnant employee transfers to a less hazardous or strenuous position prior to taking a disability leave, an employer must allow her to return to her original or to a substantially similar job in accordance with the requirements of section 7291.2(b)(7).

APPENDIX F

Federal Statutes

Section 708 of Title VII of the Civil Rights Act of 1964, as amended, provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7.

Section 1104 of Title XI of the Civil Rights Act of 1964, as amended, provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provisions of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4.

Federal Regulations

Subsection 10(b) of the E.E.O.C.'s Guidelines on Discrimination Because of Sex provides, *inter alia:*

> Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employ-

ment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities.

29 C.F.R. § 1604.10(b) (1984).

The "Appendix: Questions and Answers on the Pregnancy Discrimination Act" provides:

The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. . . . If other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy.

29 C.F.R. Part 1604 (Appendix) (1984).

Questions and Answers Nos. 9 and 29 provide:

9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

29. Q. If an employer's insurance plan provides benefits after the insured's employment has ended (i.e. extended benefits) for costs connected with pregnancy and delivery where conception occurred while the insured was working for the employer, but not for the costs of any other medical condition which began prior to termination of employment, may an employer (a) continue to pay these extended benefits for pregnancy-related medical conditions but not for other medical conditions, or (b) terminate these benefits for pregnancy-related conditions?

A. Where a health insurance plan currently provides extended benefits for other medical conditions on a less favorable basis than for pregnancy-related medical conditions, extended benefits must be provided for other medical conditions on the same basis as for pregnancy-related medical conditions. Therefore, an employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

29 C.F.R. Part 1604 (Appendix) (1984).

State Regulations

Proposed Regulations of the Fair Employment and Housing Commission provide:

Unless pursuant to a bona fide occupational qualification or business necessity, any employer who has a temporary disability leave policy or a leave of absence policy which provides for less than a four month leave, shall make available, leave time totalling up to four months, whether paid and/or unpaid leave . . . to employees who are disabled on account of pregnancy, childbirth or related medical conditions.

Section 7291.2(c)(2)(C).

Unless pursuant to a bona fide occupational qualification or business necessity, the employer shall reinstate the returning employee to her original or a substantially similar job, as defined in section 7291.2(b)(7), within a reasonable period of time. There is a rebuttable presumption that a reasonable period of time is no later than two weeks from the date of the employee's notification.

Section 7291.2(c)(2)(B).

"Original or substantially similar job." An employee who has taken a leave or been transferred to different job duties because of pregnancy, childbirth or related medical conditions must be returned to the original job with the same pay, working conditions, benefits and opportunities for advancement unless that position is no longer available due to business necessity. There is a rebuttable presumption that a woman's job while on leave due to pregnancy, childbirth, or related medical conditions can be left open or filled by a temporary employee. If the job is no longer available, an employer must make a reasonable, good faith effort to return the employee to a substantially similar job. Substantially similar job is defined as one of equal pay and benefits which is performed under similar working conditions, and provides similar opportunities for advancement.

Section 7291.2(b)(7).

OPPOSITION

BRIEF

FILED
OCT 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

In The

Supreme Court of the United States

October Term, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Petitioners,

vs.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP
Attorney General of the
State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
*MARIAN M. JOHNSTON
Deputy Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102
Telephone: (415) 557-3991

Counsel for Respondents
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964 prohibit states from enacting legislation establishing pregnancy disability leave in order to protect and promote equal employment opportunities for pregnant employees?

TABLE OF CONTENTS

Page

CONSTITUTIONAL STATUTORY AND OTHER AUTHORITY INVOLVED HEREIN 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT:

I. TITLE VII'S PREEMPTION OF STATE LAWS IS VERY LIMITED, AND THERE IS NO PREEMPTION WHERE, AS HERE, STATE LAW MERELY PROVIDES GREATER PROTECTION. 5

A. Title VII Only Preempts State Laws Which Require or Permit Acts Made Unlawful By Title VII. 5

B. The Legislative History of the PDA Shows that Congress Approved of State Statutes Similar To That of California, And Did Not Intend To Prohibit Individual States From Providing Additional Protection Against Pregnancy Discrimination. 7

II. SINCE TITLE VII DOES NOT PROHIBIT EMPLOYERS FROM PROVIDING PREGNANCY DISABILITY LEAVE, THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT CALIFORNIA'S STATUTE IS NOT PREEMPTED BY TITLE VII. 9

A. The Ninth Circuit's Decision Interpreting the PDA to Prohibit All Forms of Pregnancy Discrimination, Including Disparate Impact, Is Consistent With Other Cases, As Well As Legislative History, Federal Regulations, and Numerous Commentaries. 10

TABLE OF CONTENTS—Continued

Page

B. Cal Fed's Construction of the PDA Denies Pregnant Employees Full Protection Under Title VII and Fails To Provide Equality of Employment Opportunity. 14

C. The California Statute Is Consistent With Title VII's Prohibition of Disparate Impact Discrimination Against Pregnant Employees. 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:

	Pages
Abraham v. Graphic Arts Intern. Union, 660 F.2d 811 (D.C. Cir. 1981)	12, 17
California Federal Savings and Loan Ass'n. v. Guerra, 758 F.2d 390 (9th Cir. 1985)	*passim*
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	4, 10, 15, 17
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	11, 13
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	11
Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry, 692 P.2d 1243 (Mont. 1984)	12, 13
Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669 (1983)	10, 15
Pacific Gas & Electric Co. v. State Energy Resources Cons. and Dev't Commission, 461 U.S. 190 (1983)	7
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	7
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	6

STATUTES:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*	*passim*
Pregnancy Discrimination Act of 1978, 92 Stat. 2076	*passim*
Cal. Stats. 1978, ch. 1321, p. 4320	7
California Government Code section 12945(b)(2)	2, 3, 4, 6, 9, 15, 18, 19

TABLE OF AUTHORITIES—Continued

	Pages
Connecticut Human Rights and Opportunities Act, formerly Conn. Gen. Stat. § 31-126, now Conn. Gen. Stat. Ann. § 46a-60(a)(7)	8
Mass. Gen. Laws Ann. ch. 149, § 105D	8
Montana Maternity Leave Act, Montana Code Ann. §§ 39-7-203 and 39-7-204, now §§ 49-2-310 et seq.	8

REGULATIONS:

7 C.F.R. § 15a.57(d) (1985) (Department of Agriculture)	14
10 C.F.R. § 1040.53(d) (1985) (Department of Energy)	14
29 C.F.R. § 1604.10	2, 13
34 C.F.R. § 106.57(d) (1985) (Department of Education)	14
41 C.F.R. § 60-20.3(g)(2) (1985) (Office of Federal Contract Compliance Programs)	14
45 C.F.R. § 86.57(d) (1984) (Department of Health and Human Services)	14

TEXTS:

A. Larson & L. Larson, 1 *Employment Discrimination* 8-35 (1979)	11, 16
Equality In the Workplace: Is That Enough for Pregnant Workers? 23 J.Fam.L. 401 (1984-85)	9
Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's Law Journal — (1985)	16
Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate L. Rev. 513 (1983)	16

TABLE OF AUTHORITIES—Continued

	Pages
Review of Selected 1978 California Legislation, Employment Practices; pregnancy discrimination, 10 Pacific L.J. 461 (1979)	10
S. Kamerman, *Maternity and Parental Benefits and Leaves, An International Review* 7 (1980) (Columbia University)	17
Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978,* 94 Yale L.J. 929 (1985)	11
Weissman, *Sexual Equality Under the Pregnancy Discrimination Act,* 83 Colum. L.Rev. 690 (1983)	11
OTHER AUTHORITIES:	
37 Fed. Reg. 6836 (Apr. 5, 1972)	13
44 Fed. Reg. 23805 (Apr. 20, 1979)	13
H.R. Rep. No. 95-948, 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 4749	*passim*
Sen. Rep. No. 95-331, 1st Sess. 2 (1977)	13

No. 85-494

In The

Supreme Court of the United States

October Term, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Petitioners,

vs.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Mark Guerra, Department of Fair Employment and Housing, Cruz F. Sandoval, and Fair Employment and Housing Commission of the State of California, hereinafter collectively referred to as "California," respectfully submit this brief in opposition to the petition for writ of certiorari, which California received on September 23, 1985.

The petition seeks review of a Ninth Circuit decision, *California Federal Savings and Loan Ass'n. v. Guerra,* 758 F.2d 390 (9th Cir. 1985), Appendix A in Petition (App. A), which upheld California Government Code section 12945(b)(2) as a valid exercise of state power. The Ninth Circuit determined that the California statute was designed to promote equality of employment opportunities for pregnant women, and thus was neither inconsistent with, nor unlawful under, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* California agrees with the list of parties, opinions below, and jurisdictional statement set forth in the petition.

CONSTITUTIONAL, STATUTORY, AND OTHER AUTHORITY INVOLVED HEREIN

In addition to the constitutional provisions, federal statutes and guidelines, and state statutes and proposed regulations cited by petitioners, this case also involves 29 C.F.R. § 1604.10(c) (1985), which provides:

> "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

STATEMENT OF THE CASE

The only issue in this case is whether a state may enact legislation to ensure that women disabled by pregnancy do not suffer employment disadvantages which men never face. California enacted such legislation in 1978. California Government Code section 12945(b)(2) provides that employees disabled by pregnancy are entitled to a leave of absence from work during the period of disability, up to a maximum time of four months.

Petitioners California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce, hereinafter collectively referred to as "Cal Fed", sued for declaratory and injunctive relief, claiming that California's statute violated Title VII.[1] Cal Fed contends that Title VII, as amended by the Pregnancy Discrimination Act of 1978, 92 Stat. 2076 ("PDA"), forbids states from requiring that employees disabled by pregnancy be provided reasonable leave and reinstatement.

Cross-motions for summary judgment resulted in the Honorable Manuel L. Real of the Central District of California granting judgment in favor of Cal Fed (App. E), but the Ninth Circuit reversed on appeal, ruling that such legislation is permissible under and not preempted by Title VII because its "policy furthers 'Title VII's prophylactic purpose of achieving "equality of employment opportunities."' [citations omitted]." (758 F.2d at 396; App. A-10).

1. Petitioner California Federal Savings and Loan Association was charged with violating the California statute by denying leave to Lillian Garland, but the merits of this charge have not yet been adjudicated by Respondent Fair Employment and Housing Commission, due to the instant litigation.

SUMMARY OF ARGUMENT

While California Government Code section 12945(b)(2) differs from Title VII, as amended by the PDA, this difference does not result in preemption since the purposes of the state and federal statutes are consistent, and the state statute does not compel any behavior prohibited by the federal statute. Both are intended to ensure that female employees are protected from job loss and other employment disadvantages due to the biological fact that only women become pregnant.

While California Government Code section 12945(b)(2) may provide additional protection from employment discrimination beyond that specified in Title VII, Title VII permits states to provide this additional coverage. In particular, the history of the PDA shows that Congress intended to preserve state laws similar to California Government Code section 12945(b)(2). Since nothing in Titie VII prohibits employers from providing pregnancy disability leave, Title VII does not preempt state legislation which establishes such leave.

The view of Title VII set forth in decision below by the Ninth Circuit is consistent with that of every other appellate court to have reached the issue, and with various regulations issued by federal agencies. It is further consistent with the dissent of Brennan, J., in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which dissent the PDA was intended to effectuate.

Congress amended Title VII after the *Gilbert* decision to ensure that pregnant employees were fully protected against *all* forms of employment discrimination,

and not, as Cal Fed argues, merely to forbid discriminatory treatment while permitting policies with a disparate impact on pregnant employees to continue. Indeed, Title VII now prohibits facially neutral employment policies which have a disparate impact on pregnant employees and which are not justified by reasons of business necessity.

Since the Ninth Circuit's decision that Title VII does not preempt the California statute is consistent with prior decisions, consistent with the purpose of Title VII as amended by the PDA, and consistent with Congressional intent, this case does not present any issues requiring this Court to exercise its discretionary review.

ARGUMENT

I

TITLE VII'S PREEMPTION OF STATE LAWS IS VERY LIMITED, AND THERE IS NO PREEMPTION WHERE, AS HERE, STATE LAW MERELY PROVIDES GREATER PROTECTION.

A. Title VII Only Preempts State Laws Which Require or Permit Acts Made Unlawful By Title VII.

Title VII preempts state statutes only in extremely limited circumstances. As stated in section 708 of Title VII, 42 U.S.C. § 2000e-7:

> "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a

> State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

Since California Government Code section 12945(b)(2) requires employers to provide employees disabled by pregnancy with disability leaves of up to four months, with reinstatement thereafter, it is preempted by Title VII only if it is unlawful under Title VII for employers to provide such leave.

Unquestionably the California statute establishes a requirement for employers which is not expressly stated in Title VII, but even if a minimum period of pregnancy disability leave is not required by Title VII itself, the California statute is still not preempted by Title VII unless such leave is actually forbidden by Title VII.

The narrow scope of Title VII preemption was recently described by this Court in *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85 (1983). As stated therein:

> ". . . Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, . . . Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit." (463 U.S. at 103).

This narrow preemptive effect of Title VII disposes of Cal Fed's claim as soon as the impact of the PDA on Title VII, which is discussed below, is properly viewed. The California statute is then understood as supplementary to and fully consistent with Title VII's prohibition of *all* forms of pregnancy discrimination, including disparate impact discrimination.

B. The Legislative History of the PDA Shows that Congress Approved of State Statutes Similar To That of California, And Did Not Intend To Prohibit Individual States From Providing Additional Protection Against Pregnancy Discrimination.

California's fair employment law was enacted as an exercise of the police power of the State of California (California Government Code section 12920), and when a preemption claim is raised against a state statute enacted pursuant to such police power, the Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (*Pacific Gas & Electric Co. v. State Energy Resources Cons. and Dev't Commission*, 461 U.S. 190, 206 (1983); and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The legislative history of the PDA dispels any contention that Congress intended to invalidate state statutes such as that at issue herein. To the contrary, the legislative history of the PDA shows that Congress approved of similar state laws when it passed the PDA. The House Education and Labor Committee Report includes the finding that "[t]he following six States, as well as the District of Columbia, specifically include pregnancy in their Fair Employment Practices laws: Alaska, Connecticut, Maryland, Minnesota, Oregon, and Montana."[2] (H.R. Rep. No. 95-948, 2d Sess. 11 (1978) reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4759).

---

2. The House Committee Report's failure to make reference to the California statute is of no moment inasmuch as the Report predates the enactment of the California legislation by several months. (See 1978 U.S. Code Cong. & Admin. News 4749 and Cal. Stats. 1978, ch. 1321, p.4320.)

Of the several state laws mentioned in the House Report, the fair employment laws of both Montana and Connecticut required employers to provide women employees with reasonable pregnancy disability leave and reinstatement.[3] As Senator Javits testified concerning the PDA, "[a]lthough several State Legislatures . . . have chosen to address the problem by mandating certain types of benefits for pregnant employees, [§ 701(k)] does not go that far." (123 Cong. Rec. S14991, daily ed., Sept. 15, 1977). Furthermore, as Representative Sarasin stated in debate on the floor of the House of Representatives: "[t]he States have authority under the Constitution to go beyond requirements of Federal law in these matters, so long as their laws do not conflict with the Federal law." (124 Cong. Rec. H6864, daily ed., July 18, 1978 [remarks of Rep. Sarasin of Connecticut].)

The value in permitting states to experiment with adopting policies which exceed the requirements of federal law was recently discussed in an article which concluded that Title VII, as amended by the PDA, did not preempt states from enacting statutes such as that at issue herein. As described in that article:

> "In our federal system, states are often thought of as laboratories in which new policies and theories can be tested. The policy enunciated by the Pregnancy Discrimination Act — that pregnancy be treated like any other disability — had been in operation in at least 22 states prior to the PDA's passage in 1978.

3. See Montana Maternity Leave Act, Montana Code Ann. §§ 39-7-203 and 39-7-204, now §§ 49-2-310 et seq.; and the pregnancy provisions of the Connecticut Human Rights and Opportunities Act, formerly Conn. Gen. Stat. § 31-126, now Conn. Gen. Stat. Ann. § 46a-60(a)(7). Massachusetts also now requires employers to provide pregnancy leave. See Mass. Gen. Laws Ann. ch. 149, § 105D.

> Many states then were ahead of the federal government in adopting an important social policy. The same can be said today of the maternity leave policies of California, Connecticut, Massachusetts, and Montana." (Note, *Equality In the Workplace: Is That Enough for Pregnant Workers?* 23 J.Fam.L. 401, 416 (1984-85)).

Since Title VII expressly permits such experimentation by states, and since Congress indicated its approval of similar state statutes when it enacted the PDA, the Ninth Circuit correctly concluded that "the PDA did not demand that state law be blind to pregnancy's existence." (758 F.2d at 395, App. A-9).

II

SINCE TITLE VII DOES NOT PROHIBIT EMPLOYERS FROM PROVIDING PREGNANCY DISABILITY LEAVE, THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT CALIFORNIA'S STATUTE IS NOT PREEMPTED BY TITLE VII

Since Title VII permits states to enact legislation imposing additional requirements upon employers, so long as the practices required are not unlawful under Title VII, Title VII, as amended by the PDA, does not preempt California Government Code section 12945(b)(2) unless Title VII makes it unlawful for employers to provide pregnancy disability leave. Cal Fed contends that this is the effect of the PDA, but this contention offends the basic premise which underlies the PDA, which is that pregnant employees are entitled to full equality of employment opportunity. This means that employees disabled by pregnancy should neither be denied the benefits provided to other disabled employees, nor suffer other employment

disadvantages due to the fact that pregnancy is unique to women. Providing leave and preventing job loss for women disabled by pregnancy is certainly consistent with this basic premise, since the availability of such leave guarantees that women, like men, will not lose their jobs due to childbirth.

A. The Ninth Circuit's Decision Interpreting the PDA to Prohibit All Forms of Pregnancy Discrimination, Including Disparate Impact, Is Consistent With Other Cases, As Well As Legislative History, Federal Regulations, and Numerous Commentaries.

Both the PDA and the California statute at issue herein were enacted to overturn the decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983), and Note, *Review of Selected 1978 California Legislation, Employment Practices; pregnancy discrimination*, 10 Pacific L.J. 461, 463 (1979). Both Congress and the California Legislature disapproved of *Gilbert*'s conclusion that gender-based discrimination did not include pregnancy discrimination, and both acted immediately to ensure that employers could not discriminate against pregnant employees.

As this Court has explained on many occasions, equal employment opportunity is the goal of Title VII, and employment discrimination may occur either by disparate treatment on a prohibited basis or by disparate impact discrimination. The latter form of discrimination refers to "employment practices which are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be

justified by business necessity." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-336 n.15 (1977). This Court's seminal decision discussing disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), has been reaffirmed on repeated occasions.

The PDA did not alter the goal of Title VII; it merely added a new definitional section to Title VII, section 701(k), 42 U.S.C. § 2000e(k), specifying that sex discrimination includes pregnancy discrimination. When "because of pregnancy" is substituted for "because of sex" in the substantive provision of Title VII establishing unlawful employment practices, section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), that section then reads:

> "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . [pregnancy] . . .; or . . . to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual's . . . [pregnancy] . . . ."

This substitution shows that the PDA was intended to provide full equal employment opportunity to pregnant employees, including protection against all policies which adversely affect or have a disparate impact upon their employment opportunities. *See* Weissman, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 Colum. L.Rev. 690, 695-6 (1983); Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J.929, 934 and 939 (1985); and A. Larson & L. Larson, 1 *Employment Discrimination* 8-35 (1979).

Legislative history confirms that the PDA was enacted to expand the definition of sex discrimination to

include pregnancy discrimination, in order "to ensure that working women are protected against *all forms* of employment discrimination based on sex." (H.R. Rep. No. 95-948, 2d Sess. 3 (1978) reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4751) (emphasis added). The PDA was simply viewed as legislation which would amend Title VII "to clarify Congress' intent to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment." *(Id.,* at 2, reprinted in 1978 U.S. Code Cong. & Admin. News, at 4750).

As the Ninth Circuit stated below:

> "By making 'pregnancy' a substitute for 'sex' in Title VII's antidiscrimination mandate, Congress procured for pregnancy that which it had already procured for sex: a guarantee against discrimination of all varieties, including facially neutral policies with a disparate impact." (758 F.2d at 396; App. A-10).

Other courts have reached the same conclusion. In *Abraham v. Graphic Arts Intern. Union,* 660 F.2d 811 (D.C. Cir. 1981), the court held that an employment policy which provided inadequate disability leave and which was not justified by business necessity violated Title VII because of its disparate impact on employees disabled by pregnancy. As the court explained, "the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age — an impact no male would ever encounter." (660 F.2d at 819).

Similarly, in *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry,* 692 P.2d 1243 (Mont. 1984), appeal pending, No. 84-1545, the Montana Supreme Court stated:

> "Miller-Wohl's no-leave policy created a disparate effect on women who become pregnant compared to men who do not become pregnant. Although the policy was facially neutral, it nonetheless subjected pregnant women to job termination on a basis not faced by men. The no-leave policy therefore appears to us to be gender-based discrimination by an employer in violation of Title VII and the PDA." (692 P.2d at 1252).

See also *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry,* 515 F.Supp. 1264, 1267 (D. Mont. 1981), vacated on juris. grds. 685 F.2d 1088 (9th Cir. 1982).

The federal agency responsible for the enforcement of Title VII, the Equal Employment Opportunity Commission (EEOC), also interprets Title VII as prohibiting disparate impact discrimination against pregnant employees. As the EEOC has declared in its Sex Discrimination Guidelines on "Employment policies relating to pregnancy and childbirth":

> "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity." (29 C.F.R. § 1604.10(c) (1985)).[4]

The EEOC's guidelines interpreting Title VII are entitled to great deference. *(Griggs,* 401 U.S. at 433-434).

---

4. This guideline predated the PDA (see 37 Fed. Reg. 6836 (Apr. 5, 1972)) and was reissued unchanged following the enactment of the PDA (see 44 Fed. Reg. 23805 (Apr. 20, 1979)). Both the House and Senate Committee Reports on the PDA expressly endorsed the EEOC's interpretation of Title VII contained in 29 C.F.R. § 1604.10. (See Sen. Rep. No. 95-331, 1st Sess. 2 (1977); H.R. Rep. No. 95-948, 2d Sess. 2 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News, at 4750).

Other federal laws forbidding employment discrimination have similarly been interpreted by federal enforcement agencies as requiring employers to provide adequate leave to pregnant employees, whether or not such leave is provided to other disabled employees.[5]

Employment practices which have a disparate impact on the basis of race, color, religion, sex or national origin and which are not justified by business necessity have long been held to violate Title VII, and the PDA merely added pregnancy to the list of prohibited bases.

B. Cal Fed's Construction of the PDA Denies Pregnant Employees Full Protection Under Title VII and Fails To Provide Equality of Employment Opportunity.

Cal Fed's petition to this Court virtually ignores both disparate impact discrimination and the fact that the PDA, in its first clause, includes pregnancy within the existing prohibition of all forms of sex discrimination. Cal Fed focuses instead on the second clause of the PDA, which states that pregnant employees "shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work. . . ." Cal Fed argues, in effect, that this language limits the PDA's prohibition of pregnancy discrimination so that only disparate treatment, not disparate impact, discrimination violates Title VII. In other words, pregnant employees would be only half-way protected under Title VII.

---

5. See, 7 C.F.R. § 15a.57(d) (1985) (Department of Agriculture); 10 C.F.R. § 1040.53(d) (1985) (Department of Energy); 34 C.F.R. § 106.57(d) (1985) (Department of Education); 41 C.F.R. § 60-20.3(g)(2) (1985) (Office of Federal Contract Compliance Programs); and 45 C.F.R. § 86.57(d) (1984) (Department of Health and Human Services).

California views the second clause of the PDA quite differently, as directed towards overturning the specific holding in *Gilbert* that an employer could provide benefits to all disabled employees except those disabled by pregnancy. As this Court explained in *Newport News:*

> "The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." (462 U.S. at 684).

Newport News further recognizes that the significance of the first clause of the PDA is independent of the specific language and application of the second clause (462 U.S. at 678 n.14).

The legislative history of the PDA indicates that Congress intended the second clause to mean that employers did not have to provide to employees disabled by pregnancy any medical, sick leave, or other paid benefits which are not provided to other disabled employees (H.R. Rep. No. 95-948, 2d Sess. 5 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News at 4753).[6] But this same history shows that Congress intended to cover "other employment policies which adversely affect pregnant workers. . . ." (*Id.*, at 6, reprinted in 1978 U.S. Code Cong. & Admin. News, at 4754).

Full equality of employment opportunity for pregnant employees was clearly the purpose of the PDA, and Congress recognized that "the elimination of discrimination based on pregnancy in these employment practices in addi-

---

6. California does not interpret California Government Code section 12945(d)(2) as requiring that any benefits be paid other than those paid to other disabled employees; only leave and reinstatement are mandated (App. F-3).

tion to disability and medical benefits will go a long way toward providing *equal employment opportunities for women,* the goal of Title VII of the Civil Rights Act of 1964." *(Id.,* at 7, reprinted in 1978 U.S. Code Cong. & Admin. News, at 4755.) (emphasis added). See also Weissman, *Sexual Equality Under the Pregnancy Discrimination Act* 83 Colum. L.Rev. 690. 726 (1983) ("The [PDA] calls for . . . equality in result."), and Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality,* 13 Golden Gate L. Rev. 513, 529 (1983).

As explained in A. Larson & L. Larson, 1 *Employment Discrimination* 8-31 (1979):

> "We have here an example of the kind of case in which an 'equality' issue cannot be disposed of by decreeing that the sexes shall be treated exactly alike. . . . Clearly, if an employer says, 'All pregnant employees will be fired,' there is sex differentiation. It is really no different in effect to say, 'No maternity leaves will be granted.' "

See also Kay, *Equality and Difference: The Case of Pregnancy,* 1 Berkeley Women's Law Journal —— (1985) ("[E]quality of opportunity implies that the woman should not be disadvantaged as a result of that sex-specific variation [of pregnancy]").

If pregnant employees are to achieve Title VII's goal of equal employment opportunity, then it is essential that Title VII be understood as reaching employment practices which would cause a substantial number of pregnant em-

ployees to lose their jobs.[7] Pregnancy inevitably causes some period of disability, and California may properly determine, without violating Title VII, that the jobs of pregnant employees must be protected during that period of disability, if pregnancy is not to result in the denial of equal employment opportunity.

C. The California Statute Is Consistent With Title VII's Prohibition of Disparate Impact Discrimination Against Pregnant Employees.

The Congressional purpose in enacting the PDA was to overturn *Gilbert,* and this purpose includes approval of the *Gilbert* dissent, which states:

> "A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies." (429 U.S. at 159 (Brennan, J., dissenting)).

Consistent with this approach, California Government Code section 12945(b)(2) requires that reasonable pregnancy disability leave be provided, unless excused by reasons of a bona fide occupational qualification or business necessity. This requirement is consistent both with Title VII's goal of equal employment opportunity and with the act's prohibition of disparate impact discrimination against pregnant employees *(Abraham v. Graphic Arts Inter. Union,* 660 F.2d at 819).

California's protection of the job rights of pregnant employees no more violates Title VII than does state legis-

---

7. More than 80 percent of working women are in their prime child-bearing years, and 93 percent of these women are likely to have at least one child during their working lives. (S. Kamerman, *Maternity and Parental Benefits and Leaves, An International Review* 7 (1980) (Columbia University).

lation or employment practices which protect any other group of persons from the loss of their jobs because of a condition uniquely affecting that group. To the contrary, as the Ninth Circuit stated:

> "Attributing to Congress an intent that employers or states must ignore pregnancy completely when fashioning their disability policies would be as absurd as discovering a congressional intent that states or employers must completely ignore prostatitis on pain of violating Title VII" (758 F.2d at 395, App. A-9).

California Government Code section 12945(b)(2) no more violates Title VII's mandate of equal employment opportunity than would state legislation protecting the job rights of persons with prostatitis, sickle cell anemia, or Tay-Sachs disease.

Cal Fed mistakenly characterizes California Government Code section 12945(b)(2) as "preferential" and/or "protective" legislation. The "preferential" argument ignores the fact that the statute merely eliminates a substantial penalty that only women face — loss of their jobs due to pregnancy disability. Women are not given any advantage; they are only guaranteed they will not be placed at a disadvantage due to pregnancy. Furthermore, the statute mandating pregnancy disability leave is not based upon any stereotypic view of women or upon generalizations about women which may or may not be true, such as the stereotypes and generalizations which led to the now discredited "protective" legislation. Only women need pregnancy disability leave, and the leave is only for the period of disability.

No violation of Title VII occurs because an employer is required to eliminate practices which have a substantial disparate impact on a prohibited basis of discrimination. Since California Government Code section 12945(b)(2) does not violate Title VII and, moreover, is consistent with Title VII's goal of equality of employment opportunity, no preemption exists.

CONCLUSION

For the foregoing reasons, the Ninth Circuit correctly concluded that Title VII does not preempt California Government Code section 12945(b)(2). The preemptive effect of Title VII is very limited, and there is no preemption of state laws which mandate particular employment practices, unless those particular practices are unlawful under Title VII. Mere difference between state and federal requirements is insufficient. Since nothing in Title VII prohibits employers from providing pregnancy disability leave, Title VII does not prohibit states from requiring such leave.

Furthermore, California Government Code section 12945(b)(2) is consistent with and not violative of Title VII's goal of equal employment opportunity. The state statute merely ensures that no women lose their jobs because of an employment disadvantage no men ever face — pregnancy disability.

Since the Ninth Circuit decision is fully supported by applicable law, the instant case does not require further attention from this Court. The Petition for Writ of Certiorari should be denied.

Dated: October 21, 1985

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California
ANDREA S. ORDIN
Chief Assistant Attorney General

MARIAN M. JOHNSTON
Deputy Attorney General

Attorneys for Respondents

REPLY

BRIEF

Supreme Court, U.S.
FILED
OCT 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation;

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

ROBERT S. WARREN
WILLARD Z. CARR, JR.
THEODORE B. OLSON
*PAMELA L. HEMMINGER
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Attorneys for Petitioners California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce

* Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ARGUMENT	2
	A. THE CALIFORNIA PREGNANCY LAW CANNOT BE RECONCILED WITH THE PDA ON A DISPARATE IMPACT THEORY	2
	1. DISPARATE TREATMENT IS NOT A REMEDY FOR DISPARATE IMPACT	2
	2. THE CALIFORNIA LAW IS PREMISED ON A FACTUALLY INSUPPORTABLE PRESUMPTION	3
	B. CONGRESS DID NOT APPROVE STATE STATUTES WHICH REQUIRE PREFERENTIAL TREATMENT OF EMPLOYEES DISABLED BY PREGNANCY	5
III.	CONCLUSION	7

TABLE OF AUTHORITIES

CASES	Page
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	2
Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd on other grounds*, 707 F.2d 1005 (8th Cr. 1983)	4
Pouncy v. Prudential Insurance Co., 668 F.2d 795 (5th Cir. 1982)	4
Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984)	4
STATUTES	
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076	passim
LEGISLATIVE MATERIALS	
H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), *reprinted in* Leg. Hist. at 147	4, 6
123 Cong. Rec. S29643-4 (daily ed. Sept. 16, 1977), *reprinted in* Leg. Hist. at 78-79	6
ADMINISTRATIVE MATERIALS	
Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10(c)	5
OTHER	
S.B. Kamerman, *Maternity Policies and Working Women* (1980)	4

No. 85-494

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation;

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

I

INTRODUCTION

Pursuant to Supreme Court Rule 22.5, petitioners California Federal Savings and Loan Association, Merchants and Manufacturers Association and the California Chamber of Commerce submit this Reply Brief which addresses arguments first raised in Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

II

ARGUMENT

A. THE CALIFORNIA PREGNANCY LAW CANNOT BE RECONCILED WITH THE PDA ON A DISPARATE IMPACT THEORY.

It has long been established that facially neutral employment practices which have a substantial adverse impact on a protected group are invalid unless justified by business necessity. However, no application of disparate impact analysis can sustain the California pregnancy law which requires disparate treatment of employees on the basis of pregnancy.

The purpose of the disparate impact model is to *eliminate* the discrimination which results from policies which, while fair on their face, are discriminatory in operation. Disparate impact discrimination cannot be remedied by equally invidious disparate treatment. To do so is to substitute one form of discrimination for another. The California law is also defective because it creates a conclusive but factually insupportable presumption that all policies which do not comply with California law have a disparate impact on female employees.

1. Disparate Treatment Is Not A Remedy For Disparate Impact.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that intelligence tests and high school graduation requirements which were not job-related and which impacted blacks to a substantially greater degree than non-blacks were discriminatory and invalid. The Court did *not* hold that the selection criteria were invalid *vis a vis* blacks but valid *vis a vis* non-blacks. The Court held that "what is required by Congress is the *removal* of artificial, arbitrary, and unnecessary barriers to employment . . ." (emphasis added). *Id.* at 431. Indeed, an employer who requires non-black applicants to pass an intelligence test but does not impose the same requirement on

black applicants would certainly be found to have discriminated against non-blacks who, but for their failure to pass the test, would have been hired. Similarly, a height requirement which has a disparate impact on female and Hispanic applicants cannot continue to be enforced to deny employment to males and non-Hispanics who do not meet the height requirement and who, but for their sex or national origin, would have been hired.

That an employment policy has an adverse impact on females does not justify the extension of rights to females not equally available to males. The purpose of disparate impact analysis is to eliminate discriminatory but facially neutral policies in favor of policies that are neutral on their face *and* neutral in operation. The remedy for disparate impact is not disparate treatment.

2. The California Pregnancy Law Is Premised On A Factually Insupportable Presumption.

The assertion that the California pregnancy law is valid because an employment policy which is not in conformity with California law has an adverse impact on females is bottomed on a factually insupportable presumption. To hold that the failure to provide a four month pregnancy disability leave and to guarantee reinstatement to the same job has an adverse impact on females is tantamount to a finding that *every Title VII employer in the United States which has leave and reinstatement policies which do not comply with California law is in prima facie violation of Title VII on a disparate impact theory.*

There is no factual basis whatsoever to conclusively presume that every disability leave policy which provides less than a four month pregnancy disability leave has an adverse impact on women. There is no basis to conclude that a fifteen week disability leave policy, for example, invariably has a disparate

impact on women.[1] A policy under which an employer returns an employee to the same job if available and, if not, to other available jobs for which the employee is qualified may or may not have an adverse impact on women employees.[2]

In considering an employment policy concerning pregnancy, the district court in *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd on other grounds*, 707 F.2d 1005 (8th Cir. 1983) held:

> [T]he Court simply cannot imagine a disparate impact. . . . In the total absence of any evidence that women do in fact request lengthy leaves of absence more frequently than men, the Court cannot conclude that disparate impact has been shown.

Id. at 213 (citation omitted).

Simply because employment tests often have a disparate impact on minorities, it cannot be conclusively presumed that this will

[1]The House Committee Report states: "Testimony before the Committee indicates that in 95 percent of the cases, the time lost from work due to pregnancy is six weeks or less . . ." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5 (1978), *reprinted in* Leg. Hist. at 151. *See also* S.B. Kamerman, *Maternity Policies and Working Women* 45 (1980) ("According to a representative of [the New York State Medical Society], the usual period of disability *after* birth is six to eight weeks. Thus, a disability claim of up to twelve weeks for a normal pregnancy would be reasonable. The New York State Division of Human Rights estimated that a six-to-eight week benefit period overall is 'average' and 'predictable.' The New Jersey Commissioner of the Department of Labor and Industry stated that their figures indicated that an average claimant used 7.7 weeks.") (emphasis in original).

[2]Whether or not an employee is immediately reinstated to the same or another available job depends upon the nature of the original job classification held, whether it can be left vacant or be easily filled by a temporary employee, the number of positions in the particular job classification, employment turnover, and the employee's qualifications. Indeed, disparate impact analysis may be wholly inappropriate to test a leave/reinstatement policy such as this involving the interaction of a number of variables and employees who are not similarly situated. *Spaulding v. University of Washington*, 740 F.2d 686, 707-08 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984); *Pouncy v. Prudential Insurance Co.* 668 F.2d 795, 800 (5th Cir. 1982).

always be the case. Clearly, a state statute requiring that the numerical test scores of blacks be raised twenty percent above their actual scores could not be sustained in all instances based upon a disparate impact argument.[3]

The California pregnancy law goes well beyond the E.E.O.C. Guideline cited by respondents:

> Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act *if* it has a disparate impact on employees of one sex and is not justified by business necessity.

29 C.F.R. § 1604.10(c) (emphasis added).[4] The E.E.O.C. has not presumed adverse impact even in a "no leave" situation. California, on the other hand, has conclusively and erroneously presumed that the failure to provide a four month leave and to guarantee reinstatement to the same job invariably has an adverse impact.

The inherent conflict between the equal treatment mandated by the PDA and the preferential treatment required by the California pregnancy law is not obviated by the State's belated attempts to justify discriminatory disparate treatment by conclusory and factually unsupported contentions of disparate impact.

B. CONGRESS DID NOT APPROVE STATE STATUTES WHICH REQUIRE PREFERENTIAL TREATMENT OF EMPLOYEES DISABLED BY PREGNANCY.

In enacting the PDA, Congress most certainly did not implicitly approve state laws requiring disparate and preferential treatment of female employees disabled by pregnancy.

[3] There is no more factual basis for California's selection of four months rather than, for example, three months of leave than there would be for the selection of twenty percent rather than fifteen percent.

[4] For purposes of this brief, the validity of this Guideline is assumed *arguendo*.

Congress did recognize that six states and the District of Columbia had enacted fair employment laws explicitly prohibiting discrimination based on pregnancy. These state laws were, however, expressly referred to as providing either "(1) a provision for coverage in some form under a state disability insurance law [or] (2) a requirement of *equal treatment* of pregnant workers under a state fair employment practices law." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 10 (1978), *reprinted in* Leg. Hist. at 156 (emphasis added). The House Committee Report further states: "Twelve *additional* States have, since *Gilbert*, interpreted the prohibitions on sex discrimination in their State's FEP laws to require *equal treatment* of pregnant workers." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 11 (1978), *reprinted in* Leg. Hist. at 157 (emphasis added).

There is absolutely no evidence of any recognition by Congress that such state statutes might be construed to provide preferential treatment. As reflected in the House Committee Report, state laws were considered significant in the debate concerning the PDA because (1) many employers would experience little economic impact as a result of the PDA's requirement of equal treatment in the fringe benefit area because they were already covered by a state law and (2) employers who operated in several states faced different requirements depending on the state. H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 11 (1978), *reprinted in* Leg. Hist. at 157. Moreover, the floor debate on the PDA makes clear that Congress intended that federal law would preempt laws, such as the California pregnancy law, which discriminate on the basis of pregnancy:

> Mr. Hatch. Do the managers and sponsors of this bill intend S. 995 [PDA] to be preemptive of State laws . . .?
> Mr. Williams . . . [I]t would be a question of whether there was discrimination . . . [If] the classification and selection were discriminatory, then the State law that discriminated would not be permitted to stand . . .

123 Cong. Rec. S29643-4 (daily ed. Sept. 16, 1977), *reprinted in* Leg. Hist. at 78-79.

Thus, Congress did not implicitly approve state laws requiring or permitting unequal treatment on the basis of pregnancy. To the contrary, the legislative history and the plain language of the PDA demonstrate that Congress intended that employees disabled by pregnancy be treated in the same manner as employees disabled by other medical conditions.

III

CONCLUSION

A Writ of Certiorari should issue because this Court should resolve the critical issues of national import presented and because the decision of the Ninth Circuit Court of Appeals is in direct conflict with the decisions of this Court.

DATED: October 26, 1985

Respectfully submitted,

ROBERT S. WARREN
WILLARD Z. CARR, JR.
THEODORE B. OLSON
*PAMELA L. HEMMINGER
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER

By _____
Pamela L. Hemminger

Attorneys for Petitioners California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce

* Counsel of Record

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
OCT 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, MERCHANTS AND MANUFACTURERS ASSOCIATION, and CALIFORNIA CHAMBER OF COMMERCE,
Petitioners,
v.
MARK GUERRA, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, CRUZ F. SANDOVAL, and FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION

ROBIN S. CONRAD
Counsel of Record
PAULA J. CONNELLY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae Chamber of Commerce of the United States

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
INTRODUCTION	4
ARGUMENT	6
I. THE CALIFORNIA STATUTE MANDATES PREFERENTIAL TREATMENT OF PREGNANT EMPLOYEES IN VIOLATION OF FEDERAL LAW	6
II. THE CALIFORNIA STATUTE IS PREEMPTED BY FEDERAL LAW AND INVALIDATED BY THE SUPREMACY CLAUSE OF THE CONSTITUTION	10
A. Employers Cannot Comply With The State Statute Without Violating Federal Law	10
B. The State Statute Undermines The Objectives Of Federal Law	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. *Norris*, 103 S. Ct. 3492 (1983) 11
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 10
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 7, 11
Hines v. Davidowitz, 312 U.S. 52 (1941) 10
Homemakers, Inc. v. *Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976) 11
Miller-Wohl Co., Inc. v. *Commissioner of Labor and Industry, State of Montana*, 692 P.2d 1243 (Mont. 1984), *juris. statement filed*, 53 U.S.L.W. 3718 (U.S. Mar. 27, 1985) (No. 84-1545) ..... *passim*
Newport News Shipbuilding & Dry Dock Co. v. *EEOC*, 462 U.S. 669 (1983) 3, 8, 9
Silkwood v. *Kerr-McGee Corp.*, 104 S. Ct. 615 (1984) 10

UNITED STATES CONSTITUTION

Supremacy Clause, Art. IV, § 2 10

STATUTES

California Fair Employment and Housing Act, Cal. Gov't Code § 12945 ..... *passim*
Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West Supp. 1984) 4
Mass. Gen. Laws Ann. ch. 149 § 105D and ch. 151B § 4.11A (West Supp. 1985) 4
Montana Maternity Leave Act, Mont. Code Ann. §§ 49-2-310 to 311 (1983) 2, 3, 6, 10
Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1984)) ..... *passim*
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*
Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4 10

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS — Page

123 Cong. Rec. 29,387 (1977) 11
123 Cong. Rec. 29,664 (1977) 7
Committee Print of the Legislative History of the Pregnancy Discrimination Act, Senate Committee on Labor and Human Resources (June 1980) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-494

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, MERCHANTS AND MANUFACTURERS ASSOCIATION, and CALIFORNIA CHAMBER OF COMMERCE,
Petitioners,

v.

MARK GUERRA, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, CRUZ F. SANDOVAL, and FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST [1]

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Its

---

[1] This brief is being filed with the consent of the parties. The consent letters have been filed with the Clerk of the Court.

current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. Moreover, the Chamber has over 13,000 members in the state of California.

As one of its principal functions, the Chamber regularly presents its members' views in court on issues of national significance to the business community.[2] This case involves the scope of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1984) ("PDA"). At issue is whether a California law that requires preferential treatment of pregnant employees is inconsistent with and preempted by Title VII.

This is the second case involving the scope and preemptive effect of the PDA to come before this Court within the past year. Just last term, a Montana statute mandating preferential treatment for pregnant employees was challenged in this Court. *See Miller-Wohl Co., Inc.* v. *Commissioner of Labor and Industry, State of Montana*, 692 P.2d 1243 (Mont. 1984), *juris. statement filed*, 53 U.S.L.W. 3718 (U.S. Mar. 27, 1985) (No. 84-1545). In that case, the Montana Supreme Court held that Title VII does not preempt a state statute requiring employees to grant a reasonable leave of absence and reinstatement to pregnant employees. The Chamber

---

[2] *See, e.g., Pattern Makers League of North America* v. *NLRB*, 87 L.Ed.2d 68 (1985); *Trans World Airlines* v. *Thurston*, 105 S. Ct. 613 (1985); *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983); *U.S. Postal Service* v. *Aikens*, 460 U.S. 711 (1983); *Runyan* v. *NCR Corp.*, 759 F.2d 1253 (6th Cir. 1985), *vacated and rehearing en banc granted* (6th Cir. June 17, 1985) (No. 83-3862); *American Nurses' Association* v. *State of Illinois*, 37 Fair Empl. Prac. Cas. (BNA) 705 (N.D. Ill. 1985), *appeal filed* (7th Cir. May 7, 1985) (No. 85-1766).

urged the Court to review that decision,[3] and for the same compelling reasons seeks to present the business community's perspective on preferential treatment in the workplace in this case. This Court's definitive ruling will settle this question, and provide the certainty required for uniform personnel policies.

The California statute at issue here requires employers to grant a leave of absence to pregnant employees for up to four months, and to reinstate them when they return to work. These requirements apply regardless of the employer's existing policy on disability leave; thus California employers must grant leave and guarantee reinstatement to employees disabled by pregnancy even when company policy does not provide such benefits to other temporarily disabled employees.

In upholding this statute, the Ninth Circuit seriously misconstrued this Court's decision in *Newport News Shipbuilding & Drydock Co.* v. *EEOC*, 462 U.S. 669 (1983), and held benefits to be required that Congress specifically chose not to mandate. The Ninth Circuit's holding that Congress intended to "construct a floor beneath which pregnancy disability benefits may not drop"[4] directly contravenes explicit legislative intent, and imposes unfounded obligations on employers.

The Chamber is concerned about the labor relations problems that result from the California statute, the Montana statute, and other state laws that require pref-

---

[3] *See* Brief Amicus Curiae of the Chamber of Commerce of the United States in support of the Jurisdictional Statement (April 26, 1985), *Miller-Wohl Co., Inc.* v. *Commissioner of Labor and Industry, State of Montana, juris. statement filed*, 53 U.S.L.W. (U.S. Mar. 27, 1985) (No. 84-1545).

[4] *California Federal Savings & Loan Assoc.* v. *Guerra*, 758 F.2d 390, 396 (9th Cir. 1985), *reprinted in* Petition for Cert. A-1, at A-11.

erential treatment of pregnant employees.[5] Multistate employers are facing a difficult dilemma in trying to reconcile the preferences mandated by various state laws with a federal statute that mandates equality in the workplace. The Chamber is also concerned about the impact of preferential state laws on national uniformity within the equal employment opportunity field. For these reasons, the Chamber respectfully submits this brief, and urges this Court to grant certiorari on this important Title VII issue.

INTRODUCTION

This case involves a challenge by California Federal Savings and Loan Association ("Cal Fed") to the validity of a California statute, on the basis that it mandates preferential treatment of pregnant employees in violation of Title VII of the Civil Rights Act of 1964. The statute, as enforced by the state, requires employers to grant leave of up to four months to pregnant employees and to reinstate them when they return to work, whether or not company policy grants disability leave or reinstatement rights to other temporarily disabled employees.[6]

---

[5] As noted by Petitioner, at least two other states have statutes that include pregnancy-based classifications. Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West Supp. 1984); Mass. Gen. Laws Ann. ch. 149 § 105D and ch. 151B § 4.11A (West Supp. 1985).

[6] California Fair Employment and Housing Act, Cal. Gov't Code § 12945, provides in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
>
> . . .
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . .
>
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth or related medical conditions.

Cal Fed challenged the state law in the U.S. District Court for the Central District of California on the grounds that it mandates preferential treatment of pregnant employees in violation of Title VII and the Pregnancy Discrimination Act ("PDA"), which amended Title VII in 1978. 42 U.S.C. §§ 2000e, 2000e(k). Cal Fed argued further that the California law is preempted by these federal statutes, and therefore is null and void under the Supremacy Clause. The district court granted summary judgment for Cal Fed, holding that the California law was preempted by Title VII, and thus was "null, void, invalid and inoperative under the Supremacy Clause of the United States Constitution."[7] The U.S. Court of Appeals for the Ninth Circuit reversed, and ordered that summary judgment be entered for the defendants. The Ninth Circuit held that in enacting the PDA, Congress intended to "require employers to include pregnancy disability leave in their otherwise comprehensive benefit packages." 758 F.2d at 396, Petition for Cert. at A-10. Cal Fed now seeks review of that decision by this Court.

The Chamber believes that the Ninth Circuit grievously misconstrued the explicit intent of Congress in amending Title VII to include the Pregnancy Discrimination Act. Congress clearly stated its intention to require employers to treat pregnant employees *the same* as all other employees, and not to provide special treatment. Yet these are precisely the requirements California and Montana have imposed by enacting and enforcing these stat-

---

[7] *California Federal Savings & Loan Assoc. v. Guerra*, No. 83-4927R (C.D. Cal. Mar. 21, 1984) (Real, J.), *reprinted in* Petition for Cert. E-1, at E-15.

utes.[8] Such state laws are obstacles to federal equal employment objectives, and employers cannot comply with them without violating federal law. For these reasons, this Court should grant certiorari and clarify that federal law preempts state regulation of this important aspect of employment law.

ARGUMENT[9]

I. THE CALIFORNIA STATUTE MANDATES PREFERENTIAL TREATMENT OF PREGNANT EMPLOYEES IN VIOLATION OF FEDERAL LAW.

This California statute mandates preferential treatment of pregnant employees by requiring employers to grant them leave of up to four months and reinstatement, regardless of the employer's existing personnel policies with respect to temporary disabilities. By providing pregnant employees with greater rights than are accorded other employees, the California statute, like the Montana Maternity Leave Act, flies in the face of the Pregnancy Discrimination Act and its legislative history. For this reason alone, this Court should grant review to clarify that these state statutes contravene federal law.

---

[8] The Montana Maternity Leave Act, Mont. Code Ann. §§ 49-2-310 to 311 (1983), at issue before this Court in *Miller-Wohl, supra*, requires employers to grant pregnant employees "reasonable leave of absence" and reinstatement. Difficult compliance problems prevail for employers with business in both states. Should California law dictate what is "reasonable" under the Montana statute? Must employers have separate leave policies in each state? These questions are merely a subpart of the larger issue of whether compliance with these state statutes violates federal law.

[9] The Chamber respectfully refers this Court to the brief it filed on behalf of the company in *Miller-Wohl* for a full recitation of its position on the issue of preferential treatment of pregnant employees. Rather than burdening the Court with a complete restatement, the Chamber will briefly summarize those arguments here.

Congress enacted the PDA as an amendment to § 701 of Title VII to ensure equal treatment of pregnant employees in the workplace.[10] Congress specifically sought to overrule this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976),[11] and make it clear that an employee disabled by pregnancy is to be treated like any other disabled employee. Section 2000e(k) explicitly states that "women affected by pregnancy" shall be treated "*the same* for all employment-related purposes . . . *as other persons not so affected but similar in their ability or inability to work*" (emphasis added).

Congress intentionally chose not to mandate specific benefits for pregnant workers. Thus, under the PDA, employers who do not provide benefits to other disabled employees are not required to provide them to employees disabled by pregnancy. The statute "in no way provides special disability benefits for working women." 123 Cong. Rec. 29,664 (1977) (statement of Senator Brooke, cosponsor of S. 995, the bill that ultimately became the PDA). Rather, the PDA requires an employer to provide employees disabled by pregnancy with the same

---

[10] The Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)), provides in relevant part:

> (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

[11] In *Gilbert*, this Court had ruled that employers who excluded pregnancy-related disabilities from an employee disability income plan did not discriminate on the basis of sex in violation of Title VII.

benefits, for the same period, and on the same terms as provided to other disabled employees.[12]

Contrary to the express legislative history of the PDA, the Ninth Circuit below held that *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, "makes clear that Congress intended . . . to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." 759 F.2d at 396, *reprinted in* Petition for Cert. at A-10. *Newport News* encompassed no such holding. Nor did Congress intended such a result. In *Newport News*, this Court held that the company had discriminated against its *male* employees with respect to their terms of employment by providing less medical coverage for the pregnancy of a dependent than for all other medical conditions of dependents requiring hospitalization. The Court concluded: "petitioner's plan unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees." 462 U.S. at 684. This was hardly a holding that Congress mandated provision of a minimum level of pregnancy-related benefits. Rather, the Court held that it was discriminatory not to provide male employees with the same coverage for their dependents as provided to female employees.

---

[12] Cal. Fed's leave program, which applies equally to all disability leave, including pregnancy/childbirth disability leave, provides that employees who have completed three months of employment are entitled to 30 days of disability leave, after which the Personnel Division must make every effort to provide another similar and suitable position if the vacated position has been filled. The adequacy of this particular leave policy is not at issue before this Court. It is for Congress to determine whether to mandate a given period of leave for pregnancy-related disabilities, after considering the effect on all parties. Congress determined that federal law would require *equal* treatment of pregnancy-related disabilities, and the states are thereby precluded from mandating particular pregnancy leave policies.

As documented in the Chamber's brief in *Miller-Wohl*, the legislative history of the PDA contains repeated expressions of congressional intent that pregnant employees receive equal, but not special, treatment. Congressman Hawkins, a principal sponsor of the House bill, stressed that employers who do not provide disability benefits to employees need not, as a result of the enactment of the PDA, provide such benefits to women disabled due to pregnancy or childbirth. Leg. Hist. at 25.[13] The PDA, he stated, merely requires that employers not discriminate. *Id.* Other members of Congress were similarly emphatic about not requiring employers to create special benefits for pregnant employees.[14] Congress intended only that employers provide pregnant employees with the same benefits already available to other employees.

Contrary to the PDA and its legislative history, this California statute does not treat pregnant employees "the same" as other employees. Rather, it requires employers to grant them leave even if company policy does not provide similar leave to other workers. Congress did not intend to allow, much less mandate, such unequal treatment in the workplace. Nor does this Court's holding in *Newport News* compel a different result. Preferential treatment of pregnant employees, as legislated by the California statute, squarely conflicts with federal law. This Court should therefore grant review.

---

[13] "Leg. Hist." refers to the Committee Print of the Legislative History of the PDA prepared for the Senate Committee on Labor and Human Resources (June 1980).

[14] *See, e.g.*, Leg. Hist. at 83 (remarks of Sen. Stafford) ("[T]his bill demands equal treatment and nothing more. When an employer treats pregnancy, childbirth, and related conditions the same as he treats any other disabling condition, then he has complied with this bill."); Leg. Hist. at 41 (Senate Report on S. 995) ("[a]n employer who does not provide disability benefits or paid sick leave to other employees will not, because of S. 995, have to provide these benefits" to pregnant employees).

II. THE CALIFORNIA STATUTE IS PREEMPTED BY FEDERAL LAW AND INVALIDATED BY THE SUPREMACY CLAUSE OF THE CONSTITUTION.

Under the Supremacy Clause of the Constitution,[15] if state and federal law conflict, the state law is invalid. *Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. 615, 621 (1934). The Supremacy Clause invalidates state legislation when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Hines* v. *Davidowitz*, 312 U.S. 52, 67-68 (1941). *Accord, Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. at 621. This California statute, like the Montana statute at issue in *Miller-Wohl*, gets caught on both of these prongs, and thus is invalidated by the Supremacy Clause.

Titles VII and XI of the Civil Rights Act also contain specific provisions regarding statutory preemption. Title VII preempts any state law that operates to require or permit unlawful employment practices. § 708, 42 U.S.C. § 2000e-7. Similarly, Title XI invalidates any state law that "is inconsistent with the purposes of this Act." § 1104, 42 U.S.C. § 2000h-4. As detailed below, the California statute operates to require unlawful employment practices in violation of the purposes and provisions of Title VII, and thus is preempted by Titles VII and XI.

A. Employers Cannot Comply With The State Statute Without Violating Federal Law.

State statutes that require preferential terms of employment subject employers to the task of complying with a state mandate of special treatment for pregnant employees and a federal mandate of equal treatment for all employees. As discussed in the Chamber's brief in *Miller-Wohl*, these two mandates are entirely inconsistent. Compliance with one necessitates violating the other.

[15] U.S. Const. art. VI, § 2.

Any suggestion that the conflict between the California statute and the PDA can be eliminated by extending the state-mandated benefits to all employees must be rejected. Requiring Cal Fed to revise company policy, first by granting preferential leave to pregnant employees and then by extending leave to all employees, would turn the PDA on its head. This result is not required by federal law, and imposing it would violate that law. *Homemakers, Inc.* v. *Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976).

B. The State Statute Undermines The Objectives Of Federal Law.

Federal law requires equal treatment of all disabled employees, pregnant or otherwise, and does not permit arbitrary preferences of one type of disability over another. Differential treatment on the basis of pregnancy constitutes sex discrimination in violation of Title VII. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 103 S. Ct. 3492, 3498 n.14 (1983). *See also, General Electric Co.* v. *Gilbert*, 429 U.S. at 161-162 (Brennan, J., dissenting) ("Surely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex-related.'"). The California statute conflicts with this goal of equal opportunity by requiring preferential treatment of pregnant employees, and thus legislating discrimination in direct violation of Title VII.

The PDA was designed to treat pregnancy like any other disability and to protect pregnant workers from employment practices *not* faced by other disabled workers. 123 Cong. Rec. 29,387. It adopted equality of treatment as its standard, making benefits contained in existing

personnel programs the measure of an employer's duty toward pregnant employees. In contrast, the California statute has adopted preferential treatment as its standard, thereby undermining the objectives of federal law.

CONCLUSION

The preferences mandated by this state statute contravene the purposes of the PDA, forcing employees to choose between state and federal law because they cannot comply with both. For these reasons the Chamber respectfully urges this Court to grant certiorari.

Respectfully submitted,

ROBIN S. CONRAD
Counsel of Record

PAULA J. CONNELLY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Amicus Curiae Chamber of Commerce of the United States

October 18, 1985

JOINT APPENDIX

No. 85-494 (5)

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS and LOAN ASSOCIATION a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; and the CALIFORNIA CHAMBER OF COMMERCE, a non-profit California Corporation,

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; and the FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

On Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

---

JOINT APPENDIX

JOHN K. VAN DE KAMP
Attorney General
State of California
ANDREA SHERIDAN ORDIN
Chief Assistant
Attorney General
*MARIAN M. JOHNSTON
Deputy Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102
(415) 557-3991

Attorneys for Respondents

WILLARD Z. CARR, JR.
*THEODORE B. OLSON
PAMELA L. HEMMINGER
PAUL BLANKENSTEIN
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioners

Counsel of Record

Petition For Certiorari Filed June 21, 1985
Certiorari Granted January 13, 1986

255 pp

TABLE OF CONTENTS

Pages

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ii

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA v

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT JA-1

STIPULATED FINDINGS OF FACT JA-37

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT JA-58

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT JA-98

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT JA-128

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT JA-152

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT..JA-229

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

CALIFORNIA FEDERAL SAVINGS & LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS & MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profiit California corporation,

v.

MARK GUERRA, as Director, of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT & HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA, AND LILLIAN GARLAND.

Nos. 84-5843 and 84-5844

4/24/84 Docketed cause and entered appearances of counsel. GJB

5/03/84 Filed of May 2, Defts-Applts' CADS. (CONFATT) 5/1 -rmc-

5/08/84 Filed as May 7, 1984 CERTIFICATE OF RECORD. (n/t) (Confatt) pw

6/15/84 Filed Order (CONFATT-JRS) These appeals are consolidated. Aplts (Guerra et al.) shall file a brief of not more than 50 pgs. on Aug. 20;

---

* This Joint Appendix sets forth the Docket Entries in the courts below and other parts of the record. Both the docket entries and the other parts of the record are set forth exactly as they appear in the official record of this case below. No attempt has been made to correct typographical or grammatical errors that actually appear therein.

Aplt-Intervenor shall file a brief of not more than 25 pgs. on Aug. 20; Aples shall file a brief of not mre than 75 pgs. on Oct. 15; Aplts (Guerra, et al.,) may file a reply brief of not more than 25 pgs. on Oct. 29; Aplt-Intervenor may file a reply brief of not more than 10 pgs. on Oct. 29; If the parties comply with this schedule, the Clerk will attempt to calendar the appeal for oral argument in December in S.F. pw

8/20/84 Filed original and 15 Applts' (GUERRA, et al.) Opening Briefs (47-pgs) and 5 Excerpts of Record. 8/20 ra

8/23/84 Desig of clk's recd Aplnts Guerra, Dept of Fair Emp; Sandoval; Fair Emp of State of CA (CA 84-5843/CA 84-5844).

10/15/84 Aple's desig of clk's recd on appeal.

10/17/84 Filed orig and 15 Applts Briefs (74-pgs). 10/15 ra

10/29/84 Filed orig and 15 Applts (GUERRA, et al.) Reply Briefs (25-pgs). 10/29 ra

11/7/84 Fld applint's desig of clrk's record

12/13/84 Filed as of May 7 Cert. Transc. of Record on Appeal in Two Volumes; Clrk's Pleadings Vols. 1-2, CERT. COPIES ONLY. RMC

1/24/85 Rec'd ltr dated Jan. 23, from Marian M. Johnston, DAG, counsel for Applts. re add'l citations. (Panel) 1/23 -rmc-

2/14/85 ARGUED AND SUBMITTED BEFORE: PREGERSON, FERGUSON, CJJ; GILLIAM, DJ (S. CAL.) dm

4/16/85 Filed Opinion — Decision of the DC is REVERSED and the case is REMANDED with

instructions to grant summary judgment is favor of the state defendants. bf

4/16/85 Filed and Entered Judgment. bf

4/30/85 Filed Applts' (Cal. Federal, et al) Petition for Rehearing and suggestion for rehearing and suggestion for rehearing en banc. (PANEL, active judges) 4/29/85

5/07/85 Filed Order (Pregerson & Ferguson, CCJ; Gilliam, DJ) Opinion of 4/16/85 is amended to include Footnote 6 amendment. bf

6/21/85 Filed order (PREGERSON, FERGUSON, GILLIAM) the petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. jcw

7/03/85 MANDATE ISSUED DB

7/19/85 Notc of hrng on filing spreading judgmt of Crt of appeals for 8/5/85, 10 am

8/9/85 MO: Crt Ords that mandate of 9th CC of Appeals reversing & remanding w/instructions, further ord that the USDC denial of motn to intervene, is hereby filed/spread upon minutes of this Crt. (ENT 8/9/85)

10/08/85 Rec'd as of 9/30 notion from U.S. Supreme Court, RE: filing of petition for writ of cert. Filed in S.C. 9/18/85, S.C. #85-494. rr

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA FEDERAL SAVINGS & LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS & MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

v.

MARK GUERRA, as Director, of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT & HOUSING; OSIAS GOREN, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA.

D.C. #C-83-4927-R

8/01/83 Fld complnt. Issd Summns. Motion for Preliminary Injunction filed (not noted on docket sheet).

LODGED prop Ord fr prelim inj.

8/08/83 Memo of P/A in opp. Defendant

8/12/83 Reply to opp to mtn fr prelim inj. Plaintiff

8/15/83 Ntc & motn to dism. retnbl 9/6/83, 1a0m. Plaintiff

8/25/83 Memo of P/A in opp to defts' motn to dism. Plaintiff

8/30/83 Memo of P/A in Reply to pltfs' opp to defts' motn to dism. Defendant

8/31/83 Suppl Memo of P/A in opp to defts' motn to dism. Plaintiff

9/06/83 Fld ORD (R) for prelim injunctn and restraining deft Fair Employment and Housing Commission as stated in the pleading (ENT 9-8-83) Mld cpys & Note

9/06/83 Crt DENIES motn to dism. Fur ORDS pltfs motn fr prelim inj GRANTED & bond is set fr $1,000. MO

BOND/UNDERTAKING $1,000. fr prelim inj Fidelity & Deposit Bond no 9569441.

9/08/83 ORD defts motn tod ism DENIED.
Fld pltf's findings of fact and conclusions of law. (ENT. 9-30-83) Mld cpys & notc.

9/12/83 ANSWER Mark Guerra, Dept of Fair Employment & Housing, Osias Goren & Fair Employment & Housing Commission of State of CA.

2/13/84 Fld Stip & ORD (R) pltfs 1st & 2nd claims for declaratory and injunctive relief are limited to issues concerning and relating to reinstatement; pltfs 3rd & 4th claims for declaratory and injunctv relief based on ERISA preemption are dismd w/out prej as they are moot (ENT 2-14-84) Mld cpys

ORD for sub of deft Osias Goren to Cruz F. Sandoval.

2/15/84 Ntc of motn & motn 3-19-84, 10 am for s/j. Deft.
LODGED defts prop stmt.
LODGED defts prop jdmt.
Stipulated findings of fact.
Ntc of mtn & mtn 3-19-84, 10 am for s/j. Pltf.
LODGED pltfs prop stmt.
LODGED pltfs prop s/j.

3/05/84 Pltfs' oppos to defts' motn for s/j.
Pltfs' statemnt of genuine issues subm.
Defts' statemnt of genuine issues re motn for s/j.
Defts' memo in resp to pltfs' motn for s/j.

3/12/84 Reply memo in resp to mtn for s/j. Pltf.
Reply to opp to mtn for s/j. Deft.

3/19/84 MO: Pltfs' mtn for s/j granted & defts mtn for s/j denied.

3/21/84 Stmt of uncontroverted facts & concl of law (ENT 3-21-84) mld notcs ptys

3/30/84 Stip & Ord fr partial stay of jdmt.

4/19/84 Fld deft's NOTC OF APPEAL to 9th Cir. C/A frm judg ent 3/21/84
$70.00 fing & doc fee pd.

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2109

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hearing Date: March 19, 1984
Time: 10:00 a.m.

TOPICAL INDEX

Pages

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT JA-8

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT .. JA-9

I. INTRODUCTION JA-9

II. THE STATE STATUTE IS CONSISTENT WITH AND NOT IN CONFLICT WITH TITLE VII AND THEREFORE NOT PREEMPTED BY TITLE VII JA-11

A. An Inadequate Leave Policy and/or a Policy Which Fails to Provide For Reinstatement Constitutes a Prima Facie Violation of Title VII Since There is an Adverse Impact on Childbearing Workers JA-12

B. The State Statute is Consistent With Title VII Since it Recognizes That a Policy With An Adverse Impact on Childbearing Workers Constitutes a Prima Facie Case of Unlawful Sex Discrimination JA-21

C. The State Statute is Not in Conflict With the Provisions of the Pregnancy Discrimination Act Amendment to Title VII JA-27

D. Since the State Statute is Consistent With and Not in Conflict With Title VII, It is Not Preempted by Title VII JA-34

CONCLUSION JA-36

TABLE OF AUTHORITIES

Cases *Pages*

Federal

Abraham v. Graphic Arts Intern. Union (D.C.Cir. 1981) 660 F.2d 811 ..... JA-14, 15, 16, 21, 25

American Tobacco Co. v. Patterson (1982) 456 U.S. 63 ..... JA-13

Connecticut v. Teal (1982) 457 U.S. 440 ..... JA-13, 14

Dothard v. Rawlinson (1977) 433 U.S. 321 ..... JA-13, 23

Edmonson v. United States Steel (5th Cir. 1981) 659 F.2d 582 ..... JA-32

Ende v. Bd. of Regents of Northern Ill. University (N.D. Ill. 1983) 565 F.Supp. 501 ..... JA-33

Federation of Labor v. McAdory (1945) 325 U.S. 450 ..... JA-24

Gay v. Waiters' and Dairy Lunchmen's Union (9th Cir. 1982) 694 F.2d 531 ..... JA-13

General Electric Co. v. Gilbert (1976) 429 U.S. 125 JA-22, 28

Gregory v. Litton Systems, Inc. (C.D. Cal.) 316 F. Supp. 401 ..... JA-13

Griggs v. Duke Power Co. (1971) 401 U.S. 424 .. JA-13, 16, 17, 19, 25, 28

Jacobs v. Martin Sweets Co., Inc. (6th Cir. 1977) 550 F.2d 364 ..... JA-21

LaRivere v. Equal Employment Opportunity Com'n. (9th Cir. 1982) 682 F.2d 1275 ..... JA-32

Lefort v. Fischer (M.D. La. 1982) 548 F.Supp. 775 .. JA-24

McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792 ..... JA-13, 35

McGowan v. Maryland (1961) 366 U.S. 420 ..... JA-24

Mitchell v. Board of Trustees of Pickens Cty. (4th Cir. 1979) 599 F.2d 582 ..... JA-16, 17, 20, 21, 23

Nashville Gas Co. v. Satty (1977) 434 U.S. 136 .... JA-16

Newport News Shipbuilding & Dry Dock v. EEOC (1983) —— U.S. ——, 103 S.Ct. 2622 ... JA-12, 28, 33

North Haven Board of Education v. Bell (1982) 456 U.S. 512 ..... JA-17, 18, 19

Orloff v. Cleland (9th Cir. 1983) 708 F.2d 372 ..... JA-36

Parker v. Lester (9th Cir. 1955) 277 F.2d 708 ..... JA-24

TABLE OF AUTHORITIES

Cases — *Pages*

Federal

Poller v. Columbia Broadcasting System, Inc., (1962) 368 U.S. 464 ..... JA-36
Pullman-Standard v. Swint (1982) 456 U.S. 273 ... JA-35
Reeves v. Brand-Name Fashion Outlet, Etc. (W.D. Tenn. 1982) 532 F.Supp. 32 ..... JA-21
Shaw v. Delta Airlines, Inc. (1983) —— U.S. ——, 103 S.Ct. 2890 ..... JA-28, 34, 40
Smith v. Califano (9th Cir. 1979) 597 F.2d 152 .... JA-36
Steelworkers v. Weber (1979) 443 U.S. 193 ..... JA-32
Teamsters v. United States (1977) 431 U.S. 324 . JA-13, 35
United States v. City of Alexandria (5th Cir.) 614 F.2d 1358 ..... JA-32
Ward & Gow v. Krinsky (1972) 259 U.S. 503 ..... JA-24

State

Northern Inyo Hosp. v. Fair Emp. Practice Com. (1974) 38 Cal.App.3d 14 ..... JA-26
Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal.App.3d 29 ..... JA-26

Statutes

Federal

20 U.S.C. § 1681 et seq. JA-17
§ 1682 ..... JA-17
29 U.S.C. § 206 ..... JA-33
42 U.S.C. § 2000e JA-12, 13, 34
Title VII of the Civil Rights Act of 1964
§ 701 ..... JA-27, 28, 31
§ 703 ..... JA-12
§ 708 ..... JA-34
Pregnancy Discrimination Act of 1978 ..... JA-12

California

Cal. Gov. Code, § 12900 et seq. JA-9
§ 12943 ..... JA-22
§ 12945 ..... JA-11, 22

TABLE OF AUTHORITIES

Statutes — *Pages*

California

Cal. Fair Employment Practice Act
(former Cal. Lab. Code, §§ 1410-1433) JA-21
(former Cal. Lab. Code, § 1420.2 ..... JA-22
(former Lab. Code, § 1420.35 ..... JA-21, 22
Cal. Stats. 1978, ch. 1321 ..... JA-21
Cal. Stats. 1975, ch. 914 ..... JA-22
Cal. Stats. 1978, Summary Digest, p. 374 ..... JA-22
Cal. Stats. 1978, ch. 1321 ..... JA-21, 30

Other States

Connecticut Human Rights and Opportunities Act, § 46a-60 (formerly Conn. Gen. Stat. § 31-126) . JA-30
Montana Maternity Leave Act, Montana Code Annotated, § 49-2-310 et seq. (formerly §§ 39-7-203 & 39-7-204) JA-30

Regulations

Federal

29 C.F.R. § 1604.10 ..... JA-15
34 C.F.R. § 106.57 ..... JA-17, 18, 34
41 C.F.R. § 60-20 ..... JA-18, 34
45 C.F.R. § 86.1 et seq. JA-18
45 C.F.R. § 86.57 ..... JA-18, 34
37 Fed. Reg. 6836 (Apr. 5, 1972) JA-15
44 Fed. Reg. 23805 (Apr. 20, 1979) JA-15

State

2 Cal. Admin. Code, § 7286.7 ..... JA-26

Federal Rules

Fed. Rules of Evid., Rule 201 ..... JA-21
Fed. Rules of Civ. Proc., Rule 56 ..... JA-36

Congressional Bills/Reports

Assembly Bill 1960 (1977-1978 Reg. Sess.) JA-22
H.R. Rep. No. 92-238, 2d Sess., reprinted in (1972) U.S. Code Cong. & Admin. News 2137 ..... JA-14
H.R. Rep. No. 95-948, 2nd Sess. p. 2 (1978), reprinted in (1978) U.S. Code Cong. & Admin. News pp. 4749 ..... JA-15, 28, 29, 30, 32

TABLE OF AUTHORITIES

	Pages
Congressional Bills/Reports	
Sen. Rep. No. 95-331, 1st Sess. p. 2 (1977)	JA-15
Sen. Rep. No. 95-995, 123 Cong. Rec. S15045-15047 (Sept. 16, 1977)	JA-24
Congressional Debates	
123 Cong. Rec. at S14992 (daily ed. Sept.15, 1977) ..	JA-20
123 Cong. Rec. at S15036 (daily ed. Sept.16, 1977) ..	JA-28
123 Cong. Rec. at S15037 (daily ed. Sept.16, 1977) ..	JA-29
123 Cong. Rec. at S14991 (daily ed. Sept.15, 1977)	JA-30, 31
123 Cong. Rec. at S15042 (daily ed. Sept.16, 1977) ..	JA-30
124 Cong. Rec. H6864 (daily ed. July 18, 1978)	JA-31
Law Reviews/Digests	
Cal. Admin. Register, 80, No. 25	JA-26
Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and The Meaning of Women's Equality* (1983) 13 Golden Gate L. Rev. 513	JA-33
Leg. Counsel's Dig. of AB 1960 (1977-1978 Reg. Sess.)	JA-22
Selected 1978 Cal. Legis., 10 Pac. L.J.461	JA-22
Publications	
S. Kamerman, A. Kahn and P. Kingston, *Maternity Policies and Working Women,* (1983) Columbia University Press at p. 15	JA-14
S. Kamerman, *Maternity and Parental Benefits and Leaves, An International Review,* (1980) Columbia University, Center for Social Sciences, p. 8	JA-20
20 Facts on Women Workers (1981) U.S. Dept. of Labor, Office of the Secretary, Women's Bureau, p. 1	JA-19, 20
Employment Goals of the World Plan of Action: Developments and Issues in the United States, Report For the World Conference on the United Nations Decade For Women 1976-1985 (July 1980) U.S. Department of Labor, Office of the Secretary, Women's Bureau, p. 12	JA-20

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2109

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hearing Date

March 19, 1984
Time: 10:00 a.m.

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on Monday, March 19, 1984, at 10:00 a.m., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Manuel L. Real, United States District Judge, at the United States Courthouse, 312 North Spring Street, Los Angeles, California 90012, defendants will move this Court for an order pursuant to Rule 56, Federal Rules of Civil Procedure, granting defendants summary judgment with respect to each and every claim for relief remaining in issue in plaintiff's complaint.

Said Motion is made on the ground that the uncontroverted facts establish that California Government Code section 12945(b)(2) and defendants' interpretation thereof are consistent with and not in conflict with Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e et seq., and therefore, are not preempted by Title VII, as more fully explained in the Memorandum of Points and Authorities annexed hereto. Said Motion is and will be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities annexed hereto, the Statement of Uncontroverted Facts and Conclusions of Law filed herewith and all the pleadings and documents on file in the captioned action.

DATED: FEBRUARY 15, 1984.

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General

/s/ MARC E. TURCHIN
Marc E. Turchin

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I

INTRODUCTION

At issue in this litigation is the right of defendants to enforce the California Fair Employment and Housing Act ("FEHA"), California Government Code sections 12900 et seq. In particular this case concerns California Government Code section 12945(b)(2) ("the state statute") which requires employers who are subject to both the FEHA and Title VII to provide women workers with reasonable pregnancy leave not exceeding four months. The California Legislature deemed the state statute necessary in order to protect childbearing workers from the adverse impact occasioned by employment policies which provide insufficient or no leave ("inadequate leave") for disabilities caused by pregnancy, childbirth or related medical conditions. More specifically at issue in this litigation is the right of defendants to interpret the state statute so as to require employers to make reasonable good faith efforts to return an employee who has taken a pregnancy/childbirth leave of absence to her original or substantially similar job within a reasonable period of time, since the right to take a leave of absence for pregnancy, childbirth or related medical conditions necessarily includes the right to return to employment following such leave.

Plaintiffs seek to enjoin defendants from enforcing the state statute and seek a declaration that the state statute is invalid as preempted by Title VII. Plaintiffs claim that the state statute is preempted by Title VII insofar as defendants interpret the state statute to require reinstatement of female employees following leaves of absence for pregnancy, childbirth or related medical conditions.[1]

---

[1] The parties have stipulated that the only remaining issues in this litigation are those contained in the first and second claims

This litigation was initiated as a consequence of the following facts which have been stipulated to by the parties. Lillian D. Garland ("Garland"), a receptionist/PBX operator employed with plaintiff California Savings and Loan Association ("Cal Fed"), commenced a pregnancy/childbirth disability leave on or about January 18, 1982. Her position was filled with a permanent replacement. On or about April 20, 1982, Garland notified Cal Fed that she was able to return to work but was advised by Personnel that there was no receptionist or similar positions available at the time. Seven months later, on or about November 17, 1982, Garland accepted an offer of a receptionist position and returned to work at Cal Fed on or about November 22, 1982. (Stipulated Finding of Fact No. 10.)[2]

On or about May 2, 1982, defendant Department of Fair Employment and Housing ("Department") caused to be served on Cal Fed, on behalf of Garland, an accusation in the name of the Department alleging that Cal Fed had violated the FEHA for the reasons set forth in paragraphs 4 through 10 of said accusation, a true and correct copy of which is attached as Exhibit 3 to Cal Fed's Motion for

---

for relief which allege Title VII preemption of the state statute's reinstatement requirement. Also pursuant to stipulation between the parties, the remaining issues raised in the first and second claims for relief are either without present controversy or are moot, and the third and fourth claims for relief in their entirety are moot and should be dismissed. (See "Stipulation and Order Dismissing Plaintiffs' Third and Fourth Claims For Relief Without Prejudice," signed by counsel, and lodged with the Court on February 9, 1984.)

[2] The parties have entered into certain stipulated findings of fact, which are contained in a document entitled "Stipulated Findings of Fact." Plaintiffs have agreed that on February 15, 1984, they will file said document. All references to Stipulated Findings of Fact are to the stipulated factual findings contained in this document.

Preliminary Injunction, at pages 81-84. On or about May 2, 1983, defendant Fair Employment and Housing Commission ("Commission") served written notice on Cal Fed that a hearing would be held before the Commission upon the charges made in the accusation. Said hearing was scheduled for September 15-16, 1983. (Stipulated Finding of Fact No. 11.) This hearing was enjoined pending trial on the merits of this action.

II

THE STATE STATUTE IS CONSISTENT WITH AND NOT IN CONFLICT WITH TITLE VII AND THEREFORE NOT PREEMPTED BY TITLE VII

The state statute in issue herein provides in pertinent part:

> "It shall be an unlawful employment practice . . .
>
> ". . . .
>
> "(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . .
>
> ". . . .
>
> "(2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. . . ." (Cal. Gov. Code, §12945(b)(2).)

By requiring that employers in California provide female employees with reasonable pregnancy/childbirth leave not exceeding four months, the state statute is consistent with the policies of Title VII. The state statute protects childbearing workers from the adverse impact on the basis of sex which is associated with facially neutral employment policies that provide inadequate disability leave. Further, the protection against adverse impact afforded by the state

statute and Title VII is meaningless unless women who take disability leave on account of pregnancy, childbirth or related medical conditions have the right to return to the same or similar job within a reasonable period of time following the leave.

Since Title VII prohibits neutral employment policies with adverse impact, the state statute is not, as plaintiffs claim, in conflict with one section included within Title VII, the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k). The PDA simply guarantees that pregnant workers are provided with no less disability leave and/or right to reinstatement than is given to male employees. As the Supreme Court recently noted in *Newport News Shipbuilding & Dry Dock* v. *EEOC* (1983) —— U.S. ——, 103 S.Ct. 2622, 2631, "[t]he 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions *less* favorably than other medical conditions." (Emphasis added.)

Since the state statute protects women from employment practices with adverse impact, it is consistent with Title VII and is not in conflict with the PDA. Therefore, plaintiffs' claim that the state statute is preempted by Title VII has no merit, and defendants are entitled to summary judgment dismissing this action.

A. An Inadequate Leave Policy and/or a Policy Which Fails to Provide For Reinstatement Constitutes a Prima Facie Violation of Title VII Since There is an Adverse Impact on Childbearing Workers

Section 703(a)(1) of Title VII provides, in pertinent part, that it is unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." (42 U.S.C. § 2000e-2(a)(1).) This provision of Title VII may be violated either when an employer intentionally applies its policies unequally to the detriment of employees of one sex (*Teamsters* v. *United States* (1977) 431 U.S. 324; *McDonnell Douglas Corp.* v. *Green* (1973) 411 U.S. 792), or when an employer evenly applies facially neutral policies which have an adverse impact upon employees of one sex (*Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424; see also *American Tobacco Co.* v. *Patterson* (1982) 456 U.S. 63; *Dothard* v. *Rawlinson* (1977) 433 U.S. 321). Such a neutral policy, though facially non-discriminatory, is violative of Title VII when it has a substantial adverse impact on a basis prohibited by law and is not justified by business necessity.[3] (*Griggs* v. *Duke Power Co., supra,* at p. 424; see also *Connecticut* v. *Teal* (1982) 457 U.S. 440, 446-447; *Gay* v. *Waiters' and Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 537.) As the Court in *Griggs* noted:

> "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [a group on a basis prohibited by law] cannot be shown to be related to job performance, the practice is prohibited. . . . [¶] [C]ongress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at pp. 424-425; emphasis in original.)

The adverse impact theory of employment discrimination first articulated by the Court in *Griggs* was presaged by this District in *Gregory* v. *Litton Systems, Inc.* (C.D. Cal. 1970) 316 F.Supp. 401, affd. as modified (9th Cir. 1972) 472 F.2d 631, and, as the Supreme Court has indicated, it has been given congressional imprimatur:

---

[3] The judicially recognized defense of business necessity supplements the statutory bona fide occupational qualification defense under Title VII. (See 42 U.S.C. § 2000e-2(e).)

> "The legislative history of the 1972 amendments to Title VII . . . demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the court in *Griggs*. Both the House and Senate Reports cited *Griggs* with approval, the Senate Report noting: 'Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs.' S. Rep. No. 92-415, p. 5 (1971)." (*Connecticut* v. *Teal*, *supra*, 457 U.S. at p. 447, fn. 8.)

See also H.R. Rep. No. 92-238, 2d Sess., reprinted in (1972) U.S. Code Cong. & Admin. News 2137, 2144, 2156.

Under the adverse impact theory, facially neutral employment policies which provide little or no disability leave and/or which fail to reinstate employees are a prima facie violation of Title VII. Such policies have a significant adverse impact upon a large number of women in the labor force who must take some period of leave from their jobs for purposes of childbearing.[4] "Pregnancy and childbirth are, of course, phenomena shared only by women, and only female employees are susceptible to employment losses which may be tied to either." (*Abraham* v. *Graphic Arts Intern. Union* (D.C. Cir. 1981) 660 F.2d 811, 817.) As the

[4] It is significant to note that 75 countries, including many developing countries and every industrialized country except the United States, provide some variation of job-protected leave and a cash benefit to replace wages. (See S. Kamerman, A. Kahn and P. Kingston, *Maternity Policies and Working Women*, Columbia University Press at p. 15 (1983).) Austria, Denmark, Finland, France, Germany, Hungary, Israel, Italy, Norway, Poland, Sweden and the United Kingdom guarantee the female employee, in addition to varying periods of leave, a return to the same or a comparable job. (*Id.* at pp. 16-22.)

Equal Employment Opportunity Commission ("EEOC") has declared in interpreting Title VII:

> "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a *disparate impact* on employees of one sex and is not justified by business necessity." (29 C.F.R. 1604.10(c) (1983); emphasis added.)[5]

The fact that an employer's leave policy may have an adverse impact on women and thereby violate Title VII is specifically addressed in *Abraham* v. *Graphic Arts Intern. Union*, *supra*, 660 F.2d 811. The court recognized in that case that an inadequate employment leave policy violated Title VII since it had an adverse impact on women in their role as childbearers. The employer in *Abraham* had a sex-neutral disability policy which allowed a maximum of ten days of sick leave for employees in the complainant's job category. Because the complainant's pregnancy disability leave exceeded this ten-day maximum, she was terminated from her position. The court noted that while the employer's ten-day maximum disability leave policy "undoubtedly would accommodate a wide range of temporary disabilities, it falls considerably short of the period generally recognized in human experience as the respite needed to bear a child." (*Id.*, at p. 819.) The court, in reversing the district court's summary judgment in favor of the defendant employer, set forth the following adverse impact ruling:

[5] This guideline predated the PDA (see 37 Fed. Reg. 6836 (Apr. 5, 1972)) and was reissued unchanged following the enactment of the PDA (see 44 Fed. Reg. 23805 (Apr. 20, 1979)). Both the House and Senate Committee Reports on the PDA expressly endorsed the EEOC's interpretation of Title VII contained in 29 C.F.R. § 1604.10. (See Sen. Rep. No. 95-331, 1st Sess. p. 2 (1977); H. R. Rep. No. 95-948, 2nd Sess. p. 2 (1978), reprinted in (1978) U.S. Code Cong. & Admin. News pp. 4749, 4750.)

> "Oncoming motherhood was virtually tantamount to dismissal, though other indispositions might well and usually would impose no threat to continued employment. In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter. [Fn. omitted]
>
> *"An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have."* (*Id.* at p. 819; emphasis added.)

In reaching this conclusion, the court in *Abraham* relied in part upon the Supreme Court's decision in *Nashville Gas Co.* v. *Satty* (1977) 434 U.S. 136. The employment policy in *Satty* provided that an employee forced to take a leave of absence for any disability other than pregnancy retained accumulated seniority and continued to accrue seniority while on leave. However, if the employee were to take a leave of absence for any non-disability reason or for pregnancy, accumulated seniority was divested. The Court found that while petitioner's policy appeared to be neutral in its treatment of male and female employees, it was nevertheless unlawful under Title VII since it deprived employees returning from pregnancy leave of employment opportunities and adversely affected their status as employees. The Court recognized that, under the reasoning of *Griggs*, employment policies which are neutral on their face but which have a discriminatory effect may violate Title VII (*id.* at. p. 141), and the Court concluded Title VII cannot be read "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." (*Id.* at p. 142.)

Similarly, in *Mitchell* v. *Board of Trustees of Pickens Cty.* (4th Cir. 1979) 599 F.2d 582, cert. den. 444 U.S. 965,

the court utilized the adverse impact theory originated in *Griggs* to invalidate on Title VII grounds an employer's policy which refused to renew the contract of any teacher who at the time of renewal could not commit to a full year's service. According to the employer's policy, only pregnant workers were required to give advance notice of their inability to commit to a full year's service. The court stated that:

> "When the district court entered its original judgment for plaintiff on her Title VII claim, it correctly utilized the 'disparate impact' analysis that originated in *Griggs* . . . . Under this approach the court accurately identified the challenged policy; concluded that although facially neutral its consequences bore with disparate impact on women; and held that not being shown 'necesary to the normal operation of a school' it violated section 703(a)(1) and (2) of Title VII." (*Id.*, at p. 585.)

Other federal laws dealing with employment discrimination similarly recognize that the failure to provide reasonable pregnancy/childbirth disability leave and/or return rights from such leave adversely impacts women workers. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., prohibits sex discrimination in education programs or activities receiving federal financial assistance and provides for fund termination as a remedy for violation. Title IX is applicable to the employment policies of recipients of such funding. (*North Haven Board of Education* v. *Bell* (1982) 456 U.S. 512; see also 34 C.F.R. § 106.51(a)(1) (1983).)

In complying with its legislative mandate to promulgate regulations ensuring that aid recipients adhere to Title IX (see 20 U.S.C. § 1682), the Department of Education (formerly the Department of Health, Education and Welfare) adopted, in 34 C.F.R. § 106.57, regulations respecting preg-

nancy leave for employees of recipients. While section 106.57(c), an analogue to the PDA, requires an employer-recipient to treat pregnancy disability in the same manner generally as any other temporary disability, section 106.57 (d) provides the following:

> "(d) *Pregnancy Leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment."[6]

Under these regulations, which have been approved by the Supreme Court (see *North Haven Board of Education* v. *Bell, supra,* at pp. 516 and 535-540), an employer-recipient of Title IX funds must provide women employees

[6] The Department of Education is not alone in requiring reasonable leave and reinstatement rights to prevent discrimination against pregnant workers. The Department of Health and Human Services has also promulgated regulations to effectuate Title IX (see 45 C.F.R. §§ 86.1 et seq. (1983)). One provision of these regulations, 45 C.F.R. § 86.57(d), mirrors the requirements of 34 C.F.R. § 106.57(d). The Office of Federal Contract Compliance Programs has also formulated a similar regulation respecting pregnancy leave. (See 41 C.F.R. § 60-20(g)(2) (1983).) Both of these agencies have also adopted regulations which are analogous to the PDA (see 45 C.F.R. § 86.57(c) and 41 C.F.R. § 60-20(g)(1)), and thus prohibit differential treatment in addition to adverse impact discrimination as to pregnant workers.

with reasonable pregnancy leave and guarantee return at the same job status or risk federal fund termination. The Supreme Court would not have validated these regulations, after a lengthy discussion in *North Haven Board of Education* of the relationship between Title VII and Title IX, if an employer's obligations under Title IX, as set forth in these regulations, were considered at odds with its obligations under Title VII. Moreover, it would be unreasonable if an employee, after being denied pregnancy leave and/or reinstatement by a Title IX employer who maintained a facially neutral leave policy, could bring a successful Title IX action to terminate the employer's federal funding but could not also prevail in a Title VII action. These federal regulations reflect the recognition that inadequate leave policies have an adverse impact upon women workers and that, as a consequence, employers must provide reasonable pregnancy leave and return rights to employees disabled by pregnancy, childbirth or related medical conditions.

It is irrefutable that childbearing workers require reasonable pregnancy/childbirth disability leave and reinstatement rights if pregnancy, which is unique to women, is not to deprive women of equal employment opportunity.

National statistics relating to women and employment demonstrate the necessity for reasonable pregnancy leave and return rights to prevent layoffs and terminations which are the inevitable result of inadequate leave policies, and/or policies which do not provide for reinstatement. Failure to provide reasonable pregnancy leave and/or reinstatement constitutes precisely the type of business practices "fair in form, but discriminatory in operation" which *Griggs* proscribed.

One of the most dramatic changes in the last several decades has been the growth of the participation rates of women in the work force. Approximately 47 million women were in the labor force in 1981 compared with 32 million in 1971. (*20 Facts on Women Workers,* U.S. Department of

Labor, Office of the Secretary, Women's Bureau, 1981 p. 1.) More than 80 percent of working women are in their prime childbearing years, ages fifteen through forty-five,[7] and 93 percent of the women in this age group are likely to have at least one child during these years. (S. Kamerman, *Maternity and Parental Benefits and Leaves, An International Review*, Columbia University, Center for the Social Sciences, p. 8 (1980).) Therefore, more than four out of five women in the labor force are likely to become pregnant and will require some period of temporary leave from and reinstatement to employment as a result.[8]

Even absent statistical evidence that pregnant women require disability leave and reinstatement rights, this Court may take judicial notice of the fact that since only women become pregnant, an inadequate leave policy or a policy which fails to accommodate reinstatement will have an adverse impact on women workers because of their unique status as childbearers. It is certainly appropriate for the court to take "judicial notice of the world as it is and as it is known in common experience to be." (*Mitchell* v.

---

[7] The Department of Labor expects that nearly seventy-five per cent of the women between the ages of twenty and twenty-four will participate in the labor force through the course of the 1980's. (*Employment Goals of the World Plan of Action: Developments and Issues in the United States*, Report For the World Conference on the United Nations Decade For Women 1976-1985, U.S. Department of Labor, Office of the Secretary, Women's Bureau, p. 12, July 1980.)

[8] Senator Kennedy, one of the co-sponsors of the PDA, noted in speaking in support of the passage of the PDA that "Forty-seven percent of the labor force in the United States today are women . . . [¶] Approximately 85 percent of working women become pregnant at some point during their working lives. Of the women who are briefly disabled by their pregnancies, 60 percent return to work." (123 Cong. Rec. at S14992, daily ed., Sept. 15, 1977.)

Board of Trustees of Pickens Cty., supra, 599 F.2d 582, 585, citing Rule 201, Fed. R. Evid.) As stated in *Abraham* v. *Graphic Arts Intern. Union, supra,* 660 F.2d 811, 817, "[p]regnancy and childbirth are, of course, phenomena shared only by women, and only female employees are susceptible to employment losses which may be tied to either." As further explained by the Sixth Circuit, "[p]regnancy is a condition unique to women, so that termination of employment because of pregnancy has a disparate and invidious impact upon the female gender." (*Jacobs* v. *Martin Sweets Co., Inc.* (6th Cir. 1977) 550 F.2d 364, 370, cert. den. 431 U.S. 917.) See also *Reeves* v. *Brand-Name Fashion Outlet, Etc.* (W.D.Tenn. 1982) 532 F.Supp. 32, 34. Because pregnancy and childbearing are conditions "unique to women", any neutral employment policy which adversely impacts workers disabled by pregnancy, childbirth or related medical conditions necessarily establishes a prima facie case of unlawful sex discrimination. Therefore, failure to provide adequate leave and/or reinstatement for such workers constitutes a prima facie violation of Title VII.

(B) The State Statute is Consistent With Title VII Since it Recognizes That a Policy With An Adverse Impact on Childbearing Workers Constitutes a Prima Facie Case of Unlawful Sex Discrimination

The state statute was enacted to protect female employees affected by pregnancy and childbirth from adverse impact resulting from employment policies providing inadequate leave for employees. The state statute was created by a 1978 amendment to the California Fair Employment Practice Act (former Cal. Lab. Code, §§ 1410-1433) which added Labor Code section 1420.35 to that Act. (Cal. Stats. 1978, ch. 1321, p. 4320.)[9] The obvious impetus for the

---

[9] The Fair Employment Practice Act was rechaptered and retitled as the FEHA in 1980. The provisions of Labor Code section

enactment of section 1420.35 was the Supreme Court's decision in *General Electric Co.* v. *Gilbert* (1976) 429 U.S. 125. (See Selected 1978 California Legislation, 10 Pac.L.J. 461, 463.) *Gilbert* held that the exclusions of pregnancy and pregnancy-related disabilities from an employer's disability plan did not constitute sex discrimination under Title VII because pregnancy discrimination was not sex discrimination.

Prior to the enactment of California Labor Code section 1420.35, the California Legislature enacted California Labor Code section 1420.2, also within the Fair Employment Practice Act. Section 1420.2, now Government Code section 12943, makes it unlawful for governing boards of school districts to discriminate in employment against females because of their pregnancy, or to terminate any employee temporarily disabled, on the basis of an employment policy under which insufficient or no leave was available, if the policy has a "disparate impact" on employees of one sex and is not justified by business necessity. (Cal. Stats. 1975, ch. 914, p. 2018, § 3.)

Assembly Bill 1960 (1977-1978 Reg. Sess.), the legislation that became section 1420.35, the predecessor to the state statute in issue herein, was intended to expand the protections contained in section 1420.2 "to cover all employers, rather than just governing boards of school districts." (Leg. Counsel's Dig. of AB 1960 (1977-1978 Reg. Sess.), Cal. Stats. 1978, Summary Digest, p. 374.) Since section 1420.2 was intended to prevent adverse impact resulting from inadequate leave policies provided by school districts, the state statute, covering all employers subject to the FEHA, was aimed at broadening employee protec-

---

1420.35 were incorporated into the FEHA as Government Code section 12945. The language of Government Code section 12945(b)(2) parallels the language of former Labor Code section 1420.35 (b)(2).

tion against adverse impact on the basis of pregnancy. In making it unlawful for an employer to refuse to allow a female employee "[*t*]*o take a leave* on account of pregnancy" (emphasis added), the state statute necessarily includes within its proscription the failure to reinstate the employee to her original or substantially similar job upon completion of her leave. Without the right to return, an employee disabled on account of pregnancy, childbirth or related medical conditions experiences not a leave of absence but a layoff, termination or demotion.

The state statute is consistent with Title VII in that it reflects a recognition that insufficient or no-leave policies and the failure to provide reinstatement have an adverse impact on childbearing women and therefore may constitute sex discrimination under Title VII. In validating the California statute under the adverse impact theory, it is not necessary to establish that the leave policy of Cal Fed or those of the members of M&M and the Chamber have a statistically significant adverse impact on females. Plaintiffs challenge the statute as conflicting with and therefore preempted by Title VII, and it is irrelevant for purposes of defending the state statute or proving unlawful discrimination on the adverse impact theory whether their leave policies as applied do in fact have an adverse impact upon women. (See e.g. *Dothard* v. *Rawlinson, supra,* 433 U.S. 321, 330; *Mitchell* v. *Board of Trustees of Pickens Cty., supra,* 599 F.2d 582, 585 n.7.) Since Title VII may be violated by an employment policy which adversely impacts childbearing workers, and since the state statute merely prohibits a policy with such adverse impact, the state statute is consistent with Title VII.

Further, the court must assume that the state statute was enacted in order to prevent adverse impact to pregnant women in the work force resulting from inadequate leave policies and/or leave policies which fail to provide for reinstatement. "When a statute is assailed as uncon-

stitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part." (*Federation of Labor* v. *McAdory* (1945) 325 U.S. 450, 464; see also *McGowan* v. *Maryland* (1961) 366 U.S. 420, 425-426; *Parker* v. *Lester* (9th Cir. 1955) 227 F.2d 708, 718-719, fn.17.). It is appropriate to assume in support of the statute's validity that, absent the statute, a pregnant worker would in fact be disparately affected by being terminated from employment because of an inadequate leave policy and/or a policy which did not provide for reinstatement.[10] This is consistent with the strong presumption that in enacting a statute the legislative body understands and correctly appreciates the needs of its own people and that its laws are directed to problems which have been made manifest by experience. (*Ward & Gow* v. *Krinsky* (1922) 259 U.S. 503, 521; *Ledet* v. *Fischer* (M.D.La 1982) 548 F. Supp. 775, 787.)

---

[10] The requirement imposed by the state statute that employers provide reasonable pregnancy disability leave of up to four months is consistent with the figures introduced at the hearings on the PDA concerning the average duration of maternity leave actually taken by employees affected by pregnancy, childbirth or related medical conditions (see Sen. Rep. No. 95-995, 123 Cong. Rec. S15045-15047 (Sept. 16, 1977). A survey of the medical costs associated with providing pregnancy-related benefits was prepared by the American Counsel of Life Insurance for the Senate Human Resources Subcommittee on Labor studying the proposed PDA legislation. This survey revealed that the average duration of maternity leave taken by the employees of the 118 companies responding to the survey was 15.1 weeks. (*Id.* at S15046.) The companies participating in the survey included representatives from the following industries, among others: aircraft manufacturing (average of 12 weeks of maternity leave); airlines (average of 27 weeks of maternity leave); banks (average of 16 weeks of maternity leave); manufacturing (average of 13 weeks of maternity leave); pharmaceuticals (average of 7 weeks of maternity leave); retail (average of 15 weeks of maternity leave); and textile (average of 16 weeks of maternity leave). (*Id.* at S15046, Table A.)

By enacting the state statute, the California Legislature has removed the burden on the employee to demonstrate adverse impact by creating the presumption that failure to provide reasonable pregnancy disability leave and reinstatement adversely affects women workers and is therefore unlawful unless justified by business necessity. The defendants' interpretation of the state statute recognizes the legislative determination that failure to provide reasonable pregnancy disability leave and reinstatement has an adverse impact on childbearing workers unless justified. As the state statute is interpreted by defendants, ". . . a facially neutral employment policy under which unduly restrictive, insufficient or no leave is available will have an adverse impact on women affected by pregnancy, childbirth or related medical conditions." (See Stipulated Findings of Fact Nos. 17, 18 and 19.)

This is precisely the same result which would be reached under Title VII. In a Title VII action, the employee demonstrates that a facially neutral employment practice has an adverse impact on a prohibited basis. Once adverse impact is demonstrated, the employment practice is unlawful under Title VII unless the employer can successfully demonstrate that the practice in issue is justified by business necessity. (*Griggs* v. *Duke Power Co., supra,* 401 U.S. 424.) For example, in *Abraham* v. *Graphic Arts Intern. Union, supra,* 660 F.2d 811, the court found that the employer's failure to provide sufficient pregnancy disability leave had an adverse impact on women and therefore violated Title VII. It is noteworthy that in *Abraham,* the court took judicial notice of the fact that inadequate pregnancy disability leave "portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter." (660 F.2d at p. 819.) The state statute as interpreted by the defendants is a legislative recognition of precisely the same facts which were judicially noticed in *Abraham.*

As interpreted by the defendants, the state statute merely encompasses the adverse impact theory of discrimination

established by Title VII case law. In lieu of a Title VII plaintiff's burden of proof, the state statute creates the presumption that it is unlawful for the employer to fail to provide reasonable pregnancy disability leave and/or reinstatement to the original or a substantially similar job. The employer is excused from these requirements if the employer can demonstrate that business necessity or bona fide occupational qualification justifies the failure to provide reasonable leave and/or reinstatement.

The use of the adverse impact theory in state laws respecting employment discrimination is not unique to the state statute at issue herein. California courts have approved application of the adverse impact theory in other situations. See, for example, *Northern Inyo Hosp.* v. *Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 25 [112 Cal. Rptr. 872], and *Prescod* v. *Unemployment Ins. Appeals Bd.* (1976) 57 Cal.App.3d 29, 34 [127 Cal.Rptr. 540].)

Regulations promulgated by the Commission in 1980 (see Cal. Admin. Register, 80, No. 25) similarly incorporate the adverse impact/business necessity concepts into the FEHA. As stated in Title 2, California Administrative Code section 7286.7(b):

> "Where an employer . . . has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer . . . must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve."

The Commission has now adopted Proposed Regulation section 7291.2, "Pregnancy, Childbirth or Related Medical Conditions" ["Proposed Regulation"]. (Stipulated Finding of Fact No. 17 and Exhibit A thereto.) This Proposed Regulation sets forth the Commission's interpretation of

the state statute (Stipulated Finding of Fact No. 18), and the Department is interpreting the state statute in a manner consistent therewith (Stipulated Findings of Fact No. 19).

A review of the Proposed Regulation demonstrates that defendants' interpretation of the state statute is fully consistent with the adverse impact/business necessity concepts of Title VII. An employee completing a leave of absence on account of pregnancy, childbirth or related medical conditions is to be returned to her original job unless, due to business necessity, the position is no longer available. In that event the employer must make a reasonable, good faith effort to return the employee to a substantially similar job within a reasonable period of time. Again, business necessity is a recognized defense. (See Commission's Proposed Regulation sections 7291.2(a)(7) and 7291.2(c)(2)(B).) Under the Proposed Regulation, the state statute merely establishes a presumption of adverse impact, which an employer may rebut in precisely the same way as a prima facie case of discrimination under Title VII.

(C) The State Statute is Not in Conflict With the Provisions of the Pregnancy Discrimination Act Amendment to Title VII

Section 701(k) of Title VII (the PDA) provides, in pertinent part, that:

> "For the purposes of this subchapter—
>
> ". . . .
>
> "(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their

ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . ."

Since the PDA states that women affected by pregnancy, childbirth or related medical conditions ". . . shall be treated the same for all employment-related purposes" as other persons not so affected but similar in their ability or inability to work, plaintiffs allege that the state statute is in conflict with and therefore preempted by Title VII since by providing preferential treatment for pregnant females it constitutes sex discrimination under the PDA.[11] However, if the PDA were interpreted literally in the isolated context suggested by plaintiffs, it would invalidate the adverse impact theory as developed by *Griggs* in the area of pregnancy discrimination. It is clear from the legislative history of the PDA that the state statute was the type of state legislation of which Congress was aware and which it approved when the PDA was passed. Moreover, the state statute is consistent with the broad legislative goals of Title VII.

As with the state statute, the PDA was enacted in response to the Supreme Court's decision in *General Electric Co.* v. *Gilbert, supra,* 429 U.S. 125. (See H.R. Rep. No. 95-948, 2d Sess., p.3 (1978); see also 123 Cong. Rec. at S15036, daily ed., Sept.16, 1977 [remarks by Senator Bayh]); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC, supra,* —— U.S. ——, (1983) 103 S.Ct. 2622, 2629.) In Gilbert, the Court held that an employer's disability insurance plan excluding pregnancy-related disabilities did not violate Title VII. Even though the company's plan

[11] State statutes are not in conflict with Title VII merely because they provide additional protection for workers; they are preempted only if they purport to make practices lawful which are unlawful under Title VII. (See *Shaw* v. *Delta Airlines, Inc.* (1983) —— U.S. ——, 103 S.Ct. 2890, 2903.)

provided income maintenance for every disability that could be incurred by a man, the Court held that the plan's failure to provide disability benefits for women disabled by pregnancy did not discriminate on the basis of sex within the meaning of Title VII. The Court found that the plan was a facially neutral insurance program that only excluded pregnancy-related disability benefits.

In reaction to "the Supreme Court's narrow interpretations of Title VII [which] tend to erode our national policy of nondiscrimination in employment," the PDA was introduced to change the definition of sex discrimination in Title VII to include discrimination on the basis of pregnancy, childbirth and related medical conditions in order to ". . . reflect the common-sense view and to ensure that working women are protected against all forms of employment discrimination based on sex." (H.R. Rep. No. 95-948, 2d Sess. p.3 (1978).) The PDA was simply viewed as legislation which would amend Title VII "*to clarify Congress' intent* to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment." (H.R. Rep. No. 95-948, *supra,* p. 2; emphasis added.) As Senator Bayh, one of the co-sponsors of the legislation, noted in discussing the legislation: "In handing down its decision in *Gilbert,* the Court made it clear that if the Congress wanted to make sure that discrimination on the basis of pregnancy was to be considered sex discrimination, it would have to make that clear by passing legislation so stating. This is precisely what the legislation before us today does . . . ." (123 Cong. Rec. at S15037, daily ed., Sept. 16, 1977.)

In enacting the PDA, Congress did not intend to diminish the protections available under Title VII. Senator Javits, another co-sponsor of the legislation, stated during Senate debate on the PDA that:

"This legislation does not represent a new initiative in employment discrimination law, neither does it at-

> tempt to expand the reach of title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in [*Gilbert*] . . . [¶] I hope the Senate will recognize the remedial purpose of the bill and approve it as reported from the Human Resources Committee." (123 Cong. Rec. S14991, daily ed., Sept. 15, 1977.)

(See also remarks of Senator Williams in 123 Cong. Rec. at S15042, daily ed., Sept. 16, 1977).

Additionally, Congress did not intend in enacting the PDA to invalidate state legislation mandating pregnancy leave. The legislative history of the PDA reflects that Congress approved of state laws similar to the state statute in issue herein when it passed the PDA. The House Education and Labor Committee Report includes the finding that "[t]he following six States, as well as the District of Columbia, specifically include pregnancy in their Fair Employment Practices Law: Alaska, Connecticut, Maryland, Minnesota, Oregon, and Montana." (H.R. Rep. No. 95-948, 2d Sess, p. 11.)[12] It is significant that of the several state laws mentioned in the House Report, the fair employment laws of both Montana and Connecticut require employers to provide women employees with reasonable pregnancy disability leave and reinstatement. (See Montana Maternity Leave Act, Montana Code Annotated, §§ 39-7-203 and 39-7-204, now §§ 49-2-310 et seq.; and the pregnancy provisions of the Connecticut Human Rights and Opportunities Act, formerly Conn. Gen. Stat. § 31-126, now § 46a-60(a)(7).)

---

[12] The House Committee Report's failure to make reference to the California statute is of no moment inasmuch as the Report predates the enactment of the California legislation by several months. (See 1978 U.S. Code Cong. & Admin. News 4749 and Cal. Stats. 1978, ch. 1321, p. 4320.)

As Senator Javitts testified concerning the PDA, "[a]lthough several State Legislatures . . . have chosen to address the problem by mandating certain types of benefits for pregnant employees, [§ 701(k)] does not go that far." (123 Cong. Rec. S14991, daily ed., Sept. 15, 1977.) However, as was stated in debate on the floor of the House of Representatives: "[t]he States have authority under the Constitution to go beyond requirements of federal law in these matters, so long as their laws do not conflict with the Federal law." (124 Cong. Rec. H6864, daily ed., July 18, 1978 [remarks of Rep. Sarasin of Connecticut].)

If Congress had intended in enacting the PDA to foreclose state laws such as those of Montana and Connecticut, it would not have cited to these laws with approval. Clearly, Congress had no intent to preempt state laws similar to the California legislation when it enacted the PDA.

Discriminatory employment policies based upon pregnancy have always been at the core of the problems faced by working women, and it is clear from the legislative history of the PDA that Congress intended to forbid these discriminatory practices, not exempt pregnancy from adverse impact protection. While congressional concern was focused particularly on the issue of temporary disability insurance benefits for pregnancy, Congress also enunciated its broader goals:

> "Although recent attention has been focused on the coverage of disability benefits programs, the consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits

> will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964." (H.R. Rep. No. 95-948, 2d Sess., pp. 6-7 (1978).)

The state statute is aimed at accomplishing goals identical to those of the PDA and the legislative history of the PDA shows that Congress expressly approved of state laws such as those of Montana and Connecticut which require that employers grant reasonable pregnancy leave and reinstatement following such leave.

Plaintiffs' reliance upon a literal reading of the PDA to invalidate the state statute is also at odds with recent decisions which have refused to allow literal readings of Title VII and other federal employment discrimination legislation when to do so would frustrate their very purposes. In *Steelworkers* v. *Weber* (1979) 443 U.S. 193, rehg. den. 444 U.S. 889, the Supreme Court refused to be limited by the literal terms of Title VII prohibiting all race-based discrimination when such a literal interpretation would frustrate one of the purposes of the Act, *i.e.*, to remedy discrimination against blacks. The affirmative action plan challenged in *Weber* reserved for black employees 50 percent of the openings in an in-plant training program until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labor force. While a literal reading of Title VII would prohibit a race-conscious plan, the Court concluded that the purpose of the legislation was to relieve "the plight of the Negro in our economy." (433 U.S. at p. 202.) The *Weber* decision has provided guidance for many courts faced with challenges to affirmative action programs aimed at eliminating sex discrimination. (See e.g. *La Riviere* v. *Equal Employment Opportunity Com'n.* (9th Cir. 1982) 682 F.2d 1275, 1278-1279; *Edmonson* v. *United States Steel* (5th Cir. 1981) 659 F.2d 582, 584; *United States* v. *City of Alexandria* (5th Cir. 1980) 614 F.2d 1358, 1366.)

In *Ende* v. *Bd. of Regents of Northern Ill. University* (N.D. Ill. 1983) 565 F.Supp. 501, the court rejected a literal interpretation of the Equal Pay Act, 29 U.S.C. § 206(d), which would have invalidated the university's affirmative action salary program. This program, which had been adopted to rectify a salary differential between male and female faculty members, had the effect of raising some female faculty salaries above those of certain similarly situated male professors. The court in *Ende* found that while "[i]t is true that the [salary] plan clashes with the literal terms of the Equal Pay Act," the plan was nevertheless lawful since, among other things, "Congress could never have intended for the Equal Pay Act, an Act designed to help women, to be used as a means to strike an affirmative action program which seeks to raise and has raised the salaries of the female minority." (565 F.Supp. at p.509.)

Similarly, in the case at bar, a literal reading of the PDA to invalidate the state statute would frustrate one of the very purposes of Title VII, namely, to protect women against discrimination in the marketplace.

> "To read the PDA literally would require a *de facto* abrogation of the adverse impact doctrine as it applies to sex discrimination cases involving pregnancy. There is no reason to believe that Congress intended such a result." (Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and The Meaning of Women's Equality* (1983) 13 Golden Gate L. Rev. 513, 529.)

While the PDA guarantees that employees affected by pregnancy may not receive *less* favorable treatment than other disabled employees (*Newport News Shipbuilding & Dry Dock* v. *EEOC, supra,* —— U.S. ——, 103 S.Ct. 2622, 2631), it must be read in conjunction with the entire federal employment discrimination scheme. Title VII prohibits

employers from either engaging in discriminatory treatment of employees or utilizing policies which have an adverse impact on employees.[13] The state statute parallels the adverse impact prohibition of Title VII by recognizing that the failure to provide reasonable pregnancy/childbirth disability leave and/or reinstatement will deprive childbearing workers of the opportunity to compete equally in the workforce.

(D) Since the State Statute is Consistent With and Not in Conflict With Title VII, It is Not Preempted by Title VII

Section 708 of Title VII provides:

> "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." (42 U.S.C. § 2000e-7.)

Title VII expressly preserves non-conflicting state laws by virtue of section 708. (*Shaw* v. *Delta Airlines, Inc., supra,* —— U.S. ——, 103 S.Ct. 2890, 2902.) According to this provision, neither Title VII in general, nor the PDA in specific, preempts state laws in the area of pregnancy discrimination. Only those state laws which require or permit an act which violates the mandates of Title VII are preempted since "Title VII is neutral on the subject of all employment practices it does not prohibit." (*Id.,* at p. 2903.)

[13] As discussed above, other federal laws regulating employment discrimination similarly recognize that employment discrimination against employees affected by pregnancy occurs either when pregnant women are denied equal treatment (i.e., intentional discrimination) or when, as a consequence of facially neutral employment policies, they are denied insufficient leave and/or reinstatement (i.e., adverse impact). (Compare 34 C.F.R. § 106.57(c) & (d); 41 C.F.R. § 60-20(g)(1) & (2); 45 C.F.R. § 86.57(c) & (d).

Plaintiffs allege that the state statute conflicts with Title VII since it requires Title VII employers to provide preferential treatment to women when Title VII simply requires equal treatment. (See Complaint, ¶¶ 20 and 21, 23.) Plaintiffs' error is their failure to recognize that equal treatment may nevertheless violate Title VII when equal treatment results in adverse impact. For the reasons set forth above, the state statute as interpreted by the defendants is consistent with federal employment discrimination legislation since it protects pregnant workers from adverse impact occasioned by inadequate leave policies and/or policies which do not provide for reinstatement following such leave.

Title VII is a "broad remedial measure, designed 'to assure equality of employment opportunities.'" (*Pullman-Standard* v. *Swint* (1982) 456 U.S. 273, 276, quoting from *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. 792, 800.) The Court has repeatedly held that Title VII may be violated by policies or practices which are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group. (*Ibid.; Teamsters* v. *United States, supra,* 431 U.S. 324, 349.) By preventing the discriminatory effect which inadequate leave policies or policies which fail to provide reinstatement would have on pregnant workers, the state statute is fully consistent with the goals and objectives of Title VII and not in conflict with that federal legislation.

CONCLUSION

Since the state statute is consistent with and not in conflict with Title VII, it is not preempted by Title VII. Under Rule 56 of the Federal Rules of Civil Procedure, defendants are entitled to summary judgment because defendants' moving papers ". . . show that there is no genuine issue as to any material fact and that [defendants are] entitled to a judgment as a matter of law." (Fed. Rules, Civ. Proc., Rule 56(c).) *Poller* v. *Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464, 467; *Orloff* v. *Cleland* (9th Cir. 1983) 708 F.2d 372, 375. Summary judgment is appropriate where the only issues to be decided are issues of law. (*Smith* v. *Califano* (9th Cir. 1979) 597 F.2d 152, 155 n.4, cert. den. 444 U.S. 980.) Since as a matter of law, based upon undisputed facts, the state statute is not preempted by Title VII, defendants are entitled to summary judgment herein.

DATED: FEBRUARY 15, 1984

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General

/s/ MARC E. TURCHIN
Marc E. Turchin

MET:dm
2/13/84

Attorneys for Defendants

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2109

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

STIPULATED FINDINGS OF FACT

The following findings of fact are stipulated to by and between the parties, through their counsel of record:

1. Plaintiff California Federal Savings and Loan Association ("Cal Fed"), a federally chartered savings and loan association, is a diversified financial services organization engaged principally in savings and loan operations in California, Florida, Georgia and Nevada. The corporate headquarters of Cal Fed are located in Los Angeles within the Central District of California. Cal Fed regularly employs more than 15 employees and is engaged in an industry affecting interstate commerce and, therefore, is an employer within the meaning of both Government Code section 12926 (c) of the California Fair Employment and Housing Act ("FEHA") and 42 U.S.C. § 2000e(b) of the Civil Rights Act of 1964, as amended ("Title VII").

2. Plaintiff Merchants and Manufacturers Association ("M&M") is a non-profit California corporation with its principal office located in Los Angeles, California. M&M is a trade association and represents approximately 2,650 employers throughout the State of California. Cal Fed is a member of M&M. Consistent with its function and purpose as a trade association, M&M (a) advises its members of relevant state and federal legislative and judicial developments, including day-to-day advice on labor relations matters; (b) appears on behalf of its members before local, state and federal legislative bodies; (c) sponsors educational seminars and commissions publications designed to inform its members of their obligations under state and federal laws; and (d) when necessary, initiates proceedings in state and federal courts to protect the interests of its members.

3. Plaintiff California Chamber of Commerce (the "Chamber") is a non-profit California corporation with its principal office located in Sacramento, California. The Chamber is a statewide chamber. Over 4,300 business entities throughout California are members of the Chamber. Cal Fed is a member of the Chamber. Consistent with its functions and purposes as a chamber of commerce, the

Chamber (a) advises its members of relevant state and federal legislative and judicial developments relevant to the business community; (b) appears on behalf of its members before local, state and federal legislative bodies; (c) sponsors educational seminars and commissions publications designed to inform its members of their obligations under state and federal law; and (d) when necessary, initiates proceedings in state and federal courts to protect the interests of its members.

4. Defendant Fair Employment and Housing Commission of the State of California (the "Commission") is a statewide agency created by the Legislature of the State of California under Government Code section 12903. The functions, powers and duties of the Commission are set forth in Government Code section 12935 and include the following: to adopt, promulgate, amend and rescind suitable rules, regulations and standards which interpret, implement and apply the FEHA; to conduct and regulate hearings on accusations brought against employers who allegedly have violated the FEHA; and to hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the Commission. Defendant Cruz F. Sandoval is the Chair Commissioner of the Fair Employment and Housing Commission.

5. Defendant Department of Fair Employment and Housing (the "Department") is a statewide agency created by the Legislature of the State of California under Government Code section 12901. The functions, powers and duties of the Department are set forth in Government Code section 12930 and include the following: to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the functions and duties of the Department; to receive, investigate and conciliate complaints; to issue accusations

against employers charging them with violations of the FEHA; and to prosecute such accusations before the Commission. Defendant Mark Guerra is the Director of the Department of Fair Employment and Housing and administers and directs the Department.

6. Cal Fed has a leave of absence program for its employees including leaves for bereavement, disability, jury duty and pregnancy/childbirth disability, among others.

7. According to Cal Fed's written leave of absence policy, the following provisions apply to both disability and pregnancy/childbirth leaves:

(a) An employee must have completed the third month of employment in order to be eligible.

(b) To ensure continuous workflow, the position the employee is vacating may have to be filled. If this happens, the Personnel Division will make every effort to provide another, similar and suitable position. Under no circumstances may an employee return before contacting the Employment Department to find out whether a position is available.

(c) Cal Fed reserves the right to terminate an employee on leave of absence if a similar and suitable position is not available.

(d) Cal Fed reserves the right to terminate an employee on leave of absence if the employee fails to contact a member of the Employment Department on or before the leave's expiration date.

(e) If an employee's leave of absence exceeds 30 days, the following benefits are affected and time adjustments made:

(1) Anniversary date;

(2) Emergency leave time accrual;

(3) Insurance;

(4) Retirement;

(5) Salary review date; and

(6) Vacation accrual.

(f) Vacation time, holidays and other benefits do not accrue during the leave of absence. When the leave exceeds 30 days, the employee has the option to be paid for any unused vacation time accrued. However, if the employee elects this option and returns to work, vacation time accrual will begin again on the date of return to work.

8. M&M and The Chamber have members, engaged in interstate commerce and employing 15 or more employees, who have pregnancy disability leave policies/programs which have similar provisions to Cal Fed's leave of absence policy in that the policies/programs (1) do not provide for an immediate reinstatement right to a pregnant female at the conclusion of her disability leave or to employees returning from other disability leaves; (2) do not provide for the accrual of all benefits during the term of pregnancy leave or during the term of other disability leaves; and (3) provide that employees are not entitled to disability leaves, including a pregnancy disability leave, until the employee has completed a probationary period.

9. Plaintiff Cal Fed currently sponsors and administers numerous employee benefit plans including a medical plan, a salary continuance program to be utilized in the event of disability and a retirement plan. These plans are "employee benefit plans" within the meaning of ERISA, 29 U.S.C. § 1002(3), and plaintiff Cal Fed is a "fiduciary" of the respective plans within the meaning of section 3 (21)A of ERISA, 29 U.S.C. § 1002(21)(A).

10. Lillian D. Garland, a receptionist/PBX operator employed at Cal Fed, commenced a pregnancy/childbirth disability leave on or about January 18, 1982. Her position

was filled with a permanent replacement. On or about April 20, 1982, Ms. Garland notified Cal Fed that she was able to return to work, but was advised by Personnel that there was no receptionist or similar positions available at that time. On or about November 17, 1982, Ms. Garland accepted an offer of a receptionist position in the Accounting Department and returned to work at Cal Fed on or about November 22, 1982.

11. On or about May 2, 1983, the Department caused to be served on Cal Fed, on behalf of Lillian D. Garland, complainant, an accusation in the name of the Department, alleging that Cal Fed violated the California Fair Employment and Housing Act for the reasons set forth in paragraphs 4 through 10 of said accusation, a true and correct copy of which appears in Cal Fed's Motion For Preliminary Injunction, Exhibit 3, at pages 81-84. On or about May 2, 1983, the Commission served written notice on Cal Fed that a hearing would be held before the Commission upon the charges made in the accusation. Said hearing was scheduled for September 15-16, 1983.

12. In the accusation, the Department seeks damages on behalf of Ms. Garland and an order from the Commission that Cal Fed be compelled to change and to conform its pregnancy/childbirth disability leave policy to the requirements of Government Code section 12945(b)(2) ("section 12945(b)(2)").

13. In 1980, the Department directed and authorized the preparation of a pamphlet entitled "Questions and Answers on Pregnancy." This pamphlet was distributed to the public from 1980 through October 1983 to provide guidance to employers in complying with section 12945(b)(2) and includes the following questions and answers:

"3. Q. Does an employer have to keep the employee's job open while she is on four month pregnancy leave?

A. The employer must assign the woman who has taken a pregnancy leave to her same or similar job upon return. However, if her absence is longer than the employer's policy permits or in excess of four months, whichever is greater, the employer may fill her previously-occupied job.

. . . .

"11. Q. Must a pregnant employee be returned to the same job as a secretary even though disabled male and other female workers in the factory must take whatever job is open?

A. Yes.

. . . .

"26. Q. Is a probationary employee entitled to pregnancy benefits if other temporarily disabled probationary employees receive none?

A. Yes. A probationary employee is entitled to a leave of absence of up to four months if she becomes disabled because of her pregnancy. But the employer is not required to pay her benefits while she is on leave if other temporarily disabled probationary employees receive no benefits. When her pregnancy-related disabilities cease, the employee must be permitted to return to her same or similar job and resume her probationary status."

14. The pamphlet prepared by the Department in 1980 entitled "Questions and Answers on Pregnancy" is not being used by the Department in fulfilling its enforcement responsibilities under the FEHA and is no longer being distributed to the public.

15. The Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcement of Title VII, has issued Sex Discrimination Guidelines including "Questions and Answers On The Pregnancy Dis-

crimination Act" to provide guidance to employers in complying with Title VII, Question and Answer No. 9 is as follows:

> "9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?
>
> A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons." (29 C.F.R. Part 1604 (Appendix.)

16. The Commision issued its decision in *The Matter of the Accusation of the Department of Fair Employment and Housing* v. *Travel Express*, on August 4, 1983. This decision is a precedential decision adopted pursuant to California Government Code section 12935(h) to "serve as precedent in interpreting and applying [the FEHA]." In that decision, the Commission states that:

> "Employees on temporary disability have a right to return to their same or similar position if the period of pregnancy disability does not exceed four months. (Section 12945(b)(2) . . .)" (*Travel Express*, Case No. FEP 80-81 A7-0992s.)

17. The document, a copy of which is attached hereto as Exhibit A, is a true and correct copy of the Commission's Proposed Regulation section 7291.2, "Pregnancy, Childbirth or Related Medical Conditions" (hereinafter "Proposed Regulation § 7291.2") adopted by the Commission on January 6, 1984.

18. Proposed Regulation § 7291.2 sets forth the Commission's interpretation of Government Code section 12945 (b)(2).

19. The Department is interpreting section 12945(b)(2) in a manner consistent with Proposed Regulation § 7291.2 in fulfilling its statutory responsibilities under the FEHA.

20. Defendants interpret section 12945(b)(2) in the following manner, inter alia:

> a. It is not a violation of section 12945(b)(2) if employees on disability leave on account of pregnancy, childbirth or related medical conditions do not accrue benefits and/or service credit toward benefits under health and welfare benefit plans and retirement plans as defined in ERISA if employees on disability leaves on account of other medical conditions do not accrue benefits and/or service credit toward benefits.
>
> b. It is not a violation of section 12945(b)(2) if employees are required to complete a three-month probationary period in order to be eligible for disability leave on account of pregnancy, childbirth or related medical conditions if employees who take disability leaves on account of other medical conditions are required to complete a three-month probationary period in order to be eligible for such leaves.
>
> c. It is not a violation of section 12945(b)(2) if an employee on disability leave on account of pregnancy, childbirth or related medical conditions is required to contact a member of an employment (personnel) department on or before the expiration date of the leave if employees returning from other disability leaves have the same requirement.

21. The Department accepts all complaints alleging pregnancy discrimination pursuant to section 12945(b)(2) brought by employees residing in the State of California, including complaints alleging denial of a four-month disability leave on account of pregnancy, childbirth or related medical conditions and complaints alleging denial of rein-

statement to the original or substantially similar position within a reasonable period of time following such leave.

DATED: February 9, 1984

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General

By /s/ MARC E. TURCHIN
Marc E. Turchin

Attorneys for Defendants

DATED: February 9, 1984

GIBSON, DUNN & CRUTCHER

WILLARD Z. CARR, JR.
JEROME C. BYRNE
PAMELA L. HEMMINGER
JAN E. EAKINS

By /s/ PAMELA L. HEMMINGER
Pamela L. Hemminger

Attorneys for Plaintiffs

EXHIBIT A

7291.2 Pregnancy, Childbirth or Related Medical Conditions.

These regulations on pregnancy, childbirth or related medical conditions represent the Commission's interpretation of Government Code sections 12940, 12943, and 12945, as well as its incorporation of previous pronouncements under section 12940 on discrimination on the basis of pregnancy, childbirth or related medical conditions, consistent with Congressional recognition that discriminatory treatment on account of pregnancy, childbirth or related medical conditions constitutes sex discrimination. (Section 701(k) of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. 2000e(k).)

(a) Sex discrimination, as it is prohibited in section 12940, includes discrimination against an individual because of her pregnancy, childbearing or related medical conditions.

(b) Definitions: As used in this section, the following definitions apply:

(1) "Disability on Account of Pregnancy, Childbirth or Related Medical Conditions". An applicant's or employee's inability to perform the job in question in the usual manner due to pregnancy, childbirth or related medical conditions.

(2) "Related Medical Conditions". Medical conditions related to pregnancy or childbirth and not to any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, as defined in Government Code section 12925(f).

(3) "Normal Pregnancy". A pregnancy which is not certified as abnormal by a licensed physician.

(4) "Accrued leave". An employer policy of permitting employees to be absent from work, with

monetary compensation, because of sickness or other temporary disability.

(5) "Non-Title VII Employer". An employer, as defined in Government Code section 12925(c), with five to fourteen employees, not covered by Section 701(k) of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. 2000e(k).

(6) "All Employers". Non-Title VII employers and employers covered by section 701(K) of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. 2000e(k).

(7) "Original or substantially similar job". An employee who has taken a leave or been transferred to different job duties because of pregnancy, childbirth or related medical conditions must be returned to the original job with the same pay, working conditions, benefits and opportunities for advancement unless that position is no longer available due to business necessity. There is a rebuttable presumption that a woman's job while on leave due to pregnancy, childbirth, or related medical conditions can be left open or filled by a temporary employee. If the job is no longer available, an employer must make a reasonable, good faith effort to return the employee to a substantially similar job. Substantially similar job is defined as one of equal pay and benefits which is performed under similar working conditions, and provides similar opportunities for advancement.

(8) "Affected by Pregnancy, Childbirth or Related Medical Conditions". An employee who is experiencing the effects of pregnancy, childbirth or related medical conditions and who may or may not be disabled by these physical conditions.

(c) Leaves: In general, it is unlawful for an employer to refuse to treat pregnancy, childbirth or related medical conditions in the same manner as any other temporary disability for purposes of paid or unpaid disability leave or leaves of absence. An employee disabled on account of pregnancy, childbirth or related medical conditions is entitled to take a leave of the same duration and upon the same terms, including eligibility period for the leave, as are available to other temporarily disabled employees. Government Code sections 12943 and 12945 recognize, however, that a facially neutral employment policy under which unduly restrictive, insufficient or no leave is available will have an adverse impact on women affected by pregnancy, childbirth or related medical conditions. These sections thus provide provisions to insure that women affected by pregnancy, childbirth or related medical conditions have equal employment opportunities as persons not so affected.

(1) For non-Title VII employers, who have a temporary leave policy providing more than six weeks' paid leave for other employees, the following rule applies: An employer must only provide up to six weeks' paid leave for women who are affected by normal pregnancy, childbirth or related medical conditions, but on the same terms as such leave time is granted to other employees. If a woman is disabled by pregnancy, childbirth or related medical conditions for a period exceeding six weeks, her disability shall be treated the same as all other temporary disabilities; the six week limit does not apply.

(2) For all employers the following rules apply:

(A) An employer may require any employee who plans to take a leave on account of pregnancy, childbirth or related medical condi-

tions to give the employer reasonable notice of the date the leave will commence and the estimated duration of leave.

1) The employer shall give employees reasonable notice of this requirement.

2) An employee shall not be required to provide notice of the intended leave until such time as she can ascertain with reasonable certainty the expected date that the leave will commence.

(B) The employee shall notify the employer as soon as she is ready and able to return to work. Unless pursuant to a bona fide occupational qualification or business necessity, the employer shall reinstate the returning employee to her original or a substantially similar job, as defined in section 7291.2(b)(7), within a reasonable period of time. There is a rebuttable presumption that a reasonable period of time is no later than two weeks from the date of the employee's notification.

(C) Unless pursuant to a bona fide occupational qualification or business necessity, any employer who has a temporary disability leave policy or a leave of absence policy which provides for less than a four month leave, shall make available, leave time totalling up to four months, whether paid and/or unpaid leave (as provided below), to employees who are disabled on account of pregnancy, childbirth or related medical conditions.

1) An employee disabled on account of pregnancy, childbirth or related medical conditions shall be entitled first to utilize the full amount of her accrued paid leave

prior to commencing the remaining portion of the four months' leave.

2) An employee may also utilize any accrued vacation time or other paid leave during the otherwise unpaid remaining portion of the four months' leave.

3) If an employee has taken a leave on account of pregnancy, childbirth or related medical conditions for up to four months and the leave is in excess of the employer's temporary disability leave or other leave policy, upon her return she may not be penalized with respect to working conditions, benefits, opportunities for advancement or loss of pay.

4) Notwithstanding the provisions in section 7291.2(c)(2)(C)(3) above, an employee who has taken a leave on account of pregnancy, childbirth or related medical conditions shall accrue seniority and other benefits in the same manner as other temporarily disabled employees.

(D) It is unlawful for an employer to require a pregnant employee to take a mandatory leave on account of pregnancy, childbirth or related medical conditions prior to her determination that she is unable to perform the job in question due to pregnancy, childbirth or related medical conditions unless pursuant to a bona fide occupational qualification.

(d) Transfer to Less Hazardous or Strenuous Positions

(1) In the absence of a policy, practice, or collective bargaining agreement regarding transfers for

temporarily disabled employees, it is unlawful for a non-Title VII employer to refuse to transfer a pregnant employee to a less hazardous or strenuous position for the duration of the pregnancy provided that:

(A) The pregnant employee requests the transfer;

(B) The pregnant employee's request is based on the advice of her physician; and

(C) Such transfer can be reasonably accommodated by the employer. No employer is required to create additional employment which would not otherwise be created, discharge another employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the job.

(2) For all employers:

(A) It is unlawful for an employer to deny the request of a pregnant employee to transfer to a less hazardous or strenuous position when an employer has a policy, practice, or collective bargaining agreement which requires or authorizes the transfer of a temporarily disabled employee to a less hazardous or strenuous position for the duration of the disability.

(B) If a pregnant employee transfers to a less hazardous or strenuous position prior to taking a disability leave, an employer must allow her to return to her original or to a substantially similar job in accordance with the requirements of section 7291.2(b)(7).

GIBSON, DUNN & CRUTCHER
JEROME C. BYRNE
WILLARD Z. CARR, JR.
PAMELA L. HEMMINGER
JAN E. EAKINS
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Plaintiffs California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

Hearing

Date: March 19, 1984
Time: 10:00 a.m.
Place: Courtroom 14

To Defendants and Their Counsel of Record:

Please take notice that on March 19, 1984, at 10:00 a.m. or as soon thereafter as counsel may be heard in the Courtroom of the Honorable Manuel L. Real, United States District Court, located at 312 North Spring Street, Los Angeles, California, plaintiffs California Federal Savings and Loan Association, Merchants and Manufacturers Association, and the California Chamber of Commerce will move the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for a summary judgment in their favor declaring that state law and enforcement policies which require preferential treatment of female employees disabled by pregnancy, childbirth or related medical conditions are preempted by Title VII and permanently enjoining defendants from administering, implementing, or enforcing California Government Code Section 12945(b)(2) against plaintiffs insofar as it conflicts with Title VII as set forth in the Proposed Judgment submitted herewith. This Motion is based on the grounds that there is no genuine issue as to any material fact and that the moving parties are entitled to a judgment as a matter of law.

This Motion is based on this Notice of Motion and Motion; the attached Memorandum of Points and Authorities; the "Statement of Uncontroverted Facts and Conclusions of Law" and Proposed Judgment submitted pursuant to Local Rule 7.14.1; the Stipulated Findings of Fact lodged

with this Motion; all exhibits, pleadings and papers on file herein; and such oral argument as the Court may hear on this Motion.

Dated: February 15, 1984.

Gibson, Dunn & Crutcher
Jerome C. Byrne
Willard Z. Carr, Jr.
Pamela L. Hemminger
Jan E. Eakins

By: /s/ Pamela L. Hemminger
Pamela L. Hemminger

Attorneys for Plaintiffs
California Federal Savings and
Loan Association, Merchants and
Manufacturers Association, and
California Chamber of Commerce

TABLE OF CONTENTS

	Page
INTRODUCTION	JA-60
FACTUAL BACKGROUND	JA-62
a. Plaintiffs' Leave Policies Comply With Federal Law	JA-62
b. The Garland Accusation Seeks To Compel Cal Fed To Conform Its Leave Policy To Comply With State Law	JA-63
c. The State Has Changed Its Enforcement Policy In Certain Respects To Avoid Conflict With Federal Law, But The Reinstatement Issue Remains	JA-64
ARGUMENT	JA-68
I. FEDERAL LAW MUST PREVAIL UNDER THE SUPREMACY CLAUSE WHERE STATE LAW CONFLICTS WITH TITLE VII	JA-68
II. THE STATE LAW REQUIRING PREFERENTIAL TREATMENT FOR FEMALES DISABLED BY PREGNANCY CONFLICTS WITH TITLE VII AND IS, THEREFORE, PREEMPTED	JA-71
A. The State Law Requiring An Employer To Give Pregnant Females Preferential Reinstatement Rights At The Conclusion of a Disability Leave Is Inconsistent With The Purpose Of Congress In Enacting The Pregnancy Discrimination Amendment To Title VII	JA-71
1. Federal Law Requires That Pregnant Employees Be Treated The Same As Other Employees On The Basis Of Their Ability Or Inability To Work	JA-71

	Page
2. The Legislative History Of The Pregnancy Discrimination Amendment Clearly Demonstrates That Any Attempt To Single Out Pregnancy For Different Treatment Is Contrary To The Purpose Of Federal Law	JA-74
B. California Employers With Over Fifteen Employees Cannot Comply With Both State And Federal Law	JA-76
1. California Employers Who Comply With State Law Are Subject To Reverse Discrimination Suits Brought By Temporarily Disabled Males Who Do Not Receive The Same Treatment As Pregnant Employees	JA-76
2. State Laws Which Mandate Preferential Treatment Of Females Are To Be Invalidated, Not Extended	JA-78
CONCLUSION	JA-80

TABLE OF AUTHORITIES

Page(s)

Cases

Burns v. Rohr Corp., 346 F. Supp. 994 (S.C. Cal. 1972) JA-79

Department of Fair Employment and Housing v. Hyman-Goldberg, dba Dyn-Aura Engineering Laboratories, Case No. FEP 81-82 D8-0327s, L-29780, 84-05 ..... JA-67

Department of Fair Employment and Housing v. Travel Express JA-67

Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982) JA-69

General Electric Co. v. Gilbert, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976) JA-71

Homemakers, Inc. v. Division of Industrial Welfare, 509 F. 2d 20 (9th Cir. 1976), cert. denied, 423 U.S. 1063 (1974) JA-78

Newport News Shipbuilding and Dry Dock Company v. EEOC, 462 U.S. ——, 77 L. Ed. 2d 89, 103 S. Ct. 2622 (1983) 32 JA-76, 77, 80, 81

Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, —— U.S. ——, 75 L. Ed 2d 752, 103 S. Ct. 1713 (1983) JA-69

Ray v. Atlantic Richfield Co., 435 U.S. 151, 55 L.Ed. 2d 179, 98 S. Ct. 988 (1978) JA-69, 70

Silkwood v. Kerr-McGee Corp., —— U.S. ——, 52 U.S.L.W. 4043 (decided January 11, 1984) JA-69

Page(s)

Federal Statutes

Civil Rights Act of 1964, as amended

Title VII, Section 708, 42 U.S.C. § 2000e-7 ..... JA-70

Title VII, Section 701(k), 42 U.S.C. § 2000e-(k) JA-71

Title XI, Section 1104 42 U.S.C. § 2000h-4 ..... JA-70

Other

EEOC Compliance Manual, § 676.4, "Right to Work" JA-73

EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1004.10(b) JA-72

EEOC Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. Part 1604 (Appendix) JA-73

H.R. Rept. No. 95-948, 95th Cong., 2d Sess. (1978) *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4751-53 ..... JA-74, 75

Proposed Regulation 7291.2, "Pregnancy, Childbirth or Related Medical Conditions" ... JA-64, 65, 66

B. Schlei and P. Grossman, *Employment Discrimination Law*, 369 (2d ed. 1983) JA-79, 80

S. Rept. No. 95-331, 95th Cong., 1st Sess. (1977) ... JA-75

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this action, plaintiffs California Federal Savings and Loan Association ("Cal Fed"), Merchants and Manufacturers Association ("M & M"), and the California Chamber of Commerce (the "Chamber") seek an injunction permanently enjoining defendants from enforcing California state law as codified at California Government Code Section 12945(b)(2) ("Section 12945(b)(2)") and as enforced by defendants which requires preferential treatment of female employees disabled by pregnancy, childbirth or related medical conditions. Plaintiffs also seek a declaration that the state law and defendants' enforcement policies are preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended. On September 6, 1983, this Court denied defendants' motion to dismiss the action on jurisdictional grounds and granted Cal Fed's motion for a preliminary injunction to restrain defendant Department of Fair Employment and Housing (the "Department") from issuing accusations against Cal Fed to enforce Section 12945(b)(2) and to restrain the Fair Employment and Housing Commission (the "Commission") from proceeding to conduct a hearing on the accusation outstanding against Cal Fed.

Plaintiffs are now entitled to summary judgment granting declaratory and injunctive relief. The facts are uncontroverted[1] that state law requires employers to extend preferential treatment to pregnant female employees in

---

[1] There is clearly no genuine issue as to any material fact, because the parties have stipulated to all material facts. These Stipulated Findings of Fact have been lodged with the Court and are hereinafter referred to as "Stipulated Facts." These Stipulated Facts are also set forth in Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law.

that Section 12945(b)(2) requires an employer to reinstate an employee returning from a pregnancy disability leave to the position held prior to the leave unless that position is no longer available due to business necessity and also creates a presumption that the job of the pregnant female employee can be held open or filled by a temporary replacement even though similarly situated males are not entitled to reinstatement and even though the positions of similarly situated males are not held open. This state law is in clear conflict with federal law which requires that employees affected by pregnancy, childbirth, or related medical conditions be treated the same as employees who are not so affected but are similar in their ability or inability to work.

The state law and defendants' enforcement policies are preempted because they conflict with Title VII in that they are inconsistent with the purposes of Title VII outlawing sex discrimination and mandating equal treatment of male and female employees. While it may be argued that preferential treatment of women in this regard is "good" sex discrimination, plaintiffs respectfully submit that there is no such thing as "good" sex discrimination. Title VII provides that *all* workers, men as well as women, have the right not to be discriminated against on the basis of sex.

The state law and defendants' enforcement policy also conflict with Title VII in that compliance with both state and federal law is impossible for California employers, because compliance with state law would subject employers to "reverse" sex discrimination suits brought by male employees under federal law. Although defendants may argue that California employers can simply extend the same preferential treatment to all employees, the law is clear in this Circuit that it is the function of the state legislature to enact such broad-sweeping laws and not the federal courts.

FACTUAL BACKGROUND

a. Plaintiffs' Leave Policies Comply With Federal Law.

The Pregnancy Disability Amendment to Title VII defines "sex discrimination" to include discrimination "on the basis of pregnancy, childbirth or related medical conditions" and states that "women affected by pregnancy, childbirth or related medical conditions shall be treated *the same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (emphasis added). An employer who discriminates on the basis of pregnancy discriminates on the basis of sex and violates Title VII. Discrimination on the basis of sex, whether against males or females, is unlawful under Title VII.

Cal Fed has a pregnancy/childbirth and a disability leave of absence program for its employees that complies with federal law in that it treats female employees disabled by pregnancy the same as employees temporarily disabled by other medical conditions. Cal Fed's policy does not provide for an immediate reinstatement right to a pregnant female at the conclusion of her disability leave nor does it provide such a right to any employee returning from a disability leave; rather Cal Fed's policy provides that the position an employee is vacating may have to be filled to ensure continuous workflow. If the position is filled, the employee returning from a leave will be offered another similar and suitable position; if none is available, the employee will be reinstated to the first available opening. Cal Fed's policy also provides that an employee's service credit benefits will be adjusted if the leave of absence exceeds 30 days. In addition, the policy provides that an employee must complete the third month of employment in order to be eligible for a leave. Each of these provisions applies both to female employees disabled by pregnancy, childbirth, or related medical conditions and to employees disabled by

other medical conditions. (Stipulated Facts, paragraph 7). M & M and the Chamber have members with disability policies with provisions similar to those contained in Cal Fed's leave of absence policy. (Stipulated Facts, paragraph 8).

b. The Garland Accusation Seeks To Compel Cal Fed To Conform Its Leave Policy to State Law.

On May 2, 1983, the Department issued an accusation against Cal Fed on behalf of an individual complainant, Lillian D. Garland, and an administrative hearing was set on the matter for September 15-16, 1983. The basis of the Garland complaint was that Cal Fed had failed to immediately return her to the same or similar position upon her request to return from a pregnancy disability leave. (Stipulated Facts, paragraph 11). In the accusation, the Department also sought an order from the Commission that Cal Fed conform its leave policies to the requirements of Section 12945(b)(2). (Stipulated Facts, paragraph 12).

Section 12945 is part of California's Fair Employment and Housing Act and generally prohibits discrimination based on pregnancy. Only subsection (b)(2) of Section 12945 is aplicable to employers subject to Title VII. Section 12945(b)(2) provides in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
> . . .
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . .
>
> (2) To take a leave of absence on account of pregnancy for a reasonable period of time, provided such period shall not exceed four months.

Cal. Gov't. Code § 12945(b)(2).

At the time that the accusation was issued and this action was filed, the Department of Fair Employment and Housing enforced Section 12945(b)(2) to require employers to discriminate in favor of employees disabled by pregnancy, childbirth or related medical conditions in the following respects:

(a) Pregnant employees must be reinstated to the same or a similar position after the period of disability, regardless of the Company's policy reinstating other disabled workers;

(b) Probationary employees disabled by pregnancy are entitled to leaves of absence despite the fact that other disabled probationary employees are not; and

(c) Pregnant employees must not be punished for taking a leave when pregnant and, therefore, service time for other benefits should continue to accrue while on leave regardless of whether other disabled employees' service time is adjusted for the leave period.

See Questions and Answers on Pregnancy, Department of Fair Employment and Housing, attached as Exhibit A to the Complaint and set forth in Stipulated Facts, paragraph 13; Declaration of Deborah L. von Ehrenberg, attached as Exhibit A to Cal Fed's Motion for Preliminary Injunction.

c. The State Has Recently Changed Its Enforcement Policy In Certain Respects to Avoid Conflict With Federal Law, But The Reinstatement Issue Remains.

Shortly after this Court granted Cal Fed's Motion for a Preliminary Injunction, the Department ceased distributing its Questions and Answers pamphlet to the public to provide guidance to employers in complying with Section 12945(b)(2). (Stipulated Facts, paragraphs 13-14). On January 6, 1984, the Commission adopted Proposed

Regulation section 7291.2, "Pregnancy, Childbirth or Related Medical Conditions." This regulation sets forth the Commission's interpretation of Section 12945(b)(2) and is followed by the Department in enforcing Section 12945 (b)(2). (Stipulated Facts, paragraphs 17-19).

This new regulation made certain significant changes in the Department's enforcement policy on pregnancy discrimination with respect to the issues of benefit accrual and probationary periods. Contrary to the Department's earlier position on benefit accrual requiring preferential treatment for pregnant females, the regulations now provide that "an employee who has taken a leave on account of pregnancy, childbirth or related medical condition shall accrue seniority and other benefits in the same manner as other temporarily disabled employees." Section 7291.2(c)(2)(C)(4). On the issue of probationary periods, the regulations are also contrary to the Department's earlier enforcement policy requiring preferential treatment and now provide that "an employee disabled on account of pregnancy, childbirth or related medical conditions is entitled to take a leave of the same duration and upon the same terms, *including eligibility period for the leave,* as are available to other temporarily disabled employees." Section 7291.2(c) (emphasis added).

Based on these regulations adopted by the Commission on January 6, 1984, and defendants' interpretation of Section 12945(b)(2) as set forth in paragraph 20 of the Stipulated Findings of Fact, the parties have stipulated that the plaintiffs' third and fourth claims for declaratory and injunctive relief based on ERISA preemption be dismissed without prejudice on the grounds that said claims are now moot. The parties have also stipulated that the Title VII claims are limited to issues concerning and relating to reinstatement; there is no present controversy with respect to the probationary period issue, and the issues regarding benefit accrual and the requirement of contacting the employer before the expiration date of the leave are now moot.

While implicitly recognizing and correcting the conflict with Title VII relating to certain terms of disability leaves, defendants continue to require preferential treatment of pregnant females with respect to the reinstatement issue. This issue has two major components—the presumption that an employee's job can be held open or filled by a temporary replacement during the period of disability and the requirement that the employee be reinstated to her original or to a substantially similar position following the leave.

Section 7291.2(c)(2)(B) of the state's pregnancy regulations provides that "unless pursuant to a bona fide occupational qualification or business necessity, the employer shall reinstate the returning employee to her original or a substantially similar job, as defined in section 7291.2(b)(7), within a reasonable period of time." Original or substantially similar job is defined as:

> An employee who has taken a leave or been transferred to different job duties because of pregnancy, childbirth or related medical conditions must be returned to the original job with the same pay, working conditions, benefits and opportunities for advancement unless that position is no longer available due to business necessity. There is a rebuttable presumption that a woman's job while on leave due to pregnancy, childbirth, or related medical conditions can be left open or filled by a temporary employee. If the job is no longer available, an employer must make a reasonable, good faith effort to return the employee to a substantially similar job. Substantially similar job is defined as one of equal pay and benefits which is performed under similar working conditions, and provides similar opportunities for advancement.

Section 7291.2(b)(7).

The Commission has also issued a precedential decision which requires preferential treatment of employees disabled by pregnancy, childbirth, or related medical conditions. On August 4, 1983, the Commission issued its decision in *Department of Fair Employment and Housing v. Travel Express* in which it states that "[e]mployees on temporary disability have a right to return to their same or similar position if the period of pregnancy disability does not exceed four months. (Section 12945(b)(2) . . .)"[2] (Stipulated Facts, paragraph 16). The Commission's position was recently reiterated in its decision of February 2, 1984, in *Department of Fair Employment and Housing v. Hyman-Goldberg, dba Dyn-Aura Engineering Laboratories,* Case No. FEP 81-82 D8-0327s, L-29780, 84-05. There the Commission stated:

> We noted preliminarily that the Commission has previously held that employees on pregnancy disability leave as mandated by Government Code Section 12945 (b)(2) have a right to return to their same or similar position at the end of that leave [citing *Travel Express*]. The reason for this holding is, of course, that the term "leave" carries within it the connotation of permission to be absent from work for a certain period of time without a change in one's work status as a result of that absence.

Dyn-Aura Engineering Laboratories, p. 7. A copy of the *Dyn-Aura* decision is attached hereto as Exhibit A for the Court's ease of reference.

Thus, state law as enforced by defendants provides that an employer is required to hold open the position vacated by a pregnant employee or fill it with a temporary replacement during the term of her leave unless justified by busi-

---

[2] Plaintiffs have been advised that a writ of administrative mandamus has been taken on the jurisdictional issue of whether the respondent in the *Travel Express* case is an "employer" subject to the Fair Employment and Housing Act, but no decision has been issued at this time.

ness necessity,[3] even though the employer does not provide the same benefit to males on disability leaves. State law also now requires an employer, unless justified by business necessity, to reinstate an employee returning from a leave on account of pregnancy, childbirth, or related medical conditions to her original or substantially similar job despite the fact that employees on other disability leaves must await an available opening if their job has been filled or eliminated while they were on leave. Such a law requiring preferential treatment of females disabled by pregnancy and requiring employers to discriminate against male employees is in clear conflict with Title VII which mandates equal treatment.

ARGUMENT

I

FEDERAL LAW MUST PREVAIL UNDER THE SUPREMACY CLAUSE WHERE STATE LAW CONFLICTS WITH TITLE VII.

Federal law preempts state law under the Supremacy Clause of the United States Constitution where either of the following is demonstrated: (1) congressional intent to preempt state law, as reflected in explicit preemptive language in the federal statute or as inferred from pervasive

---

[3] In order to show "business necessity" under the Commission's regulations,

> the employer . . . must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact.

Fair Employment and Housing Commission's Regulations, Section 7286.7(b) (as amended April 30, 1980 and May 21, 1980).

federal regulations duly authorized between state and federal law. *See Silkwood v. Kerr-McGee Corp.*, —— U.S. ——, 52 U.S.L.W. 4043, 4046 (decided January 11, 1984); *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982).

Where an actual conflict between state and federal law exists, the federal law preempts and nullifies the state law. As recognized by the Supreme Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978), the conflict resulting in preemption occurs in either of two situations:

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jones v. Rath Packing Co., supra*, at 526, 540, 541. *Accord, De Canas v. Bica*, 424 U.S. 351, 363 (1976).

Id. at 158. *Accord, Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, —— U.S. ——, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983).

It is clear that, in enacting Title VII, Congress did not intend to occupy the entire field of employment discrimination law and that the states are generally free to legislate to prohibit discrimination *unless* the state law is inconsistent with federal law. Section 708 of Title VII itself expressly addresses this issue

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, *other than any such law which purports to require or permit the doing of any act which would be unlawful employment practice under this title.*

42 U.S.C. § 2000e-7 (emphasis added). Section 1104 of Title XI of the Civil Rights Act of 1964, as amended, also provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provisions of this Act be construed as invalidating any provision of State law *unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.*

42 U.S.C. § 2000h-4 (emphasis added).

Here, Section 12945(b)(2) and defendants' enforcement policies conflict with Title VII in both respects set forth in *Ray v. Atlantic Richfield Co., supra.* First, the state law stands as an obstacle to the accomplishment (1) of the purpose of the Pregnancy Discrimination Amendment to Title VII which requires that female employees disabled by pregnancy be treated the *same* as other employees based on their ability or inability to work; and (2) of the purpose of Title VII prohibiting discrimination on the basis of sex against male employees. Second, plaintiffs cannot comply both with their obligation under Title VII to provide the same treatment to employees disabled by pregnancy and those disabled by other medical conditions and their obligation under state law to provide preferential treatment to females who are disabled by pregnancy, childbirth, or related medical conditions.

II

THE STATE LAW REQUIRING PREFERENTIAL TREATMENT FOR FEMALES DISABLED BY PREGNANCY CONFLICTS WITH TITLE VII AND IS, THEREFORE, PREEMPTED.

A. The State Law Requiring An Employer to Give Pregnant Females Preferential Reinstatement Rights At The Conclusion Of A Disability Leave Is Inconsistent With The Purpose Of Congress In Enacting The Pregnancy Discrimination Amendment.

1. *Federal Law Requires That Pregnant Employees Be Treated The Same As Other Employees On The Basis Of Their Ability Or Inability To Work.*

The federal statutory mandate is one of equality of treatment of men and women. Section 701(k) of Title VII, as amended by the Pregnancy Discrimination Act of 1978, provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the *same* for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(h) of this Title shall be interpreted to permit otherwise. . . .

42 U.S.C. § 2000e(k). (emphasis added)

The enactment of the Pregnancy Disability Amendment to Title VII was prompted by the decision of the United States Supreme Court in *General Electric Co. v. Gilbert,* 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976). In *Gilbert,* the Court ruled that employers who excluded pregnancy-related disabilities from coverage under other-

wise comprehensive income protection plans do not discriminate on the basis of sex in violation of Title VII. The *Gilbert* court reasoned that disparity of treatment between pregnancy-related disabilities and other disabilities did not constitute sex discrimination. This interpretation of Title VII was expressly invalidated by the Pregnancy Discrimination Act, and discrimination based upon pregnancy, childbirth or related medical conditions *is* discrimination based upon sex under Title VII.

The Equal Employment Opportunity Commission ("EEOC") is the federal agency charged with enforcement of Title VII. The EEOC has promulgated "Guidelines on Sex Discrimination" which specifically deal with the issue of reinstatement rights as follows:

> Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, *reinstatement,* and payment under any health or disability insurance or sick leave plan, formal or informal, *shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.*

29 C.F.R. § 1004.10(b) (emphasis added).

The "Questions and Answers on the Pregnancy Discrimination Act" promulgated by the EEOC also squarely address the issue of holding open a job for an employee on a disability leave.

> 9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?
>
> A. Unless the employee has informed the employer that she does not intend to return to work, *her job must be held open for her return on the same basis*

> *as jobs are held open for employees on sick or disability leave for other reasons.*

Question and Answer No. 9, 29 C.F.R. Part 1604 (Appendix) (emphasis added).

In addition, the EEOC Compliance Manual, prepared by the EEOC to provide guidance to its staff members in enforcing Title VII, deals with the reinstatement issue. The Compliance Manual clearly demonstrates the conflict between state and federal law when it provides as follows:

> Although *an employer is not required to hold open for any specified period of time the job of an employee on leave of absence for pregnancy-related reasons,* the employer may not treat her less favorably than it treats other employees seeking to return to work after comparable absences for nonpregnancy reasons. If, for example, the employer makes arrangements for temporary susbtitutes for employees on leave because of disabilities other than pregnancy and holds their jobs open for six weeks, or six months, or one year, the employer must afford the *same* reinstatement opportunities to employees on leave because of pregnancy-related disabilities.
>
> *The right to work is not an absolute guarantee, rather, it is the right to be treated as other employees or applicants are, on the basis of individual abilities or inabilities and not on the basis of sex or sex stereotypes.* This right makes it unlawful for an employer to treat employees or applicants who are affected by pregnancy or related conditions less favorably than employees who are affected by other conditions but who are similarly able or unable to work. Such disparate treatment is sex discrimination in violation of Title VII.

EEOC Compliance Manual, § 676.4, "Right to Work," reprinted in EEOC Compliance Manual (CCH) ¶ 4804 (12-83) (emphasis added).

2. *The Legislative History Of The Pregnancy Discrimination Amendment Clearly Demonstrates That Any Attempt To Single Out Pregnancy For Different Treatment Is Contrary To The Purpose Of Federal Law.*

The legislative intent of Congress in enacting the Pregnancy Disability Amendment to Title VII is abundantly clear—employees disabled by pregnancy are to be treated in exactly the same manner as employees disabled by other medical conditions. The House Committee Report on "Prohibition of Sex Discrimination Based on Pregnancy," H.R. 6075 provides:

> H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that *pregnant workers be treated the same as other employees on the basis of their ability or inability to work.*
>
> • • •

It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employees to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. H.R. 6075 in no way requires the institution of any new programs where none currently exist. *The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.*

The "same treatment" may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work.

H.R. Rept. No. 95-948, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4751-53 (emphasis added).

The Senate Committee Report is equally clear in describing the proposed legislation as a bill mandating equal treatment of pregnant employees and employees disabled by other medical conditions:

> Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits as other workers who are disabled from working.

S. Rept. No. 95-331, 95th Cong., 1st Sess. (1977).

In rejecting an amendment to put a 6-week cap on the receipt of benefits by women disabled by pregnancy, congressional intent to disapprove of any classification based on pregnancy is made abundantly clear. As Senator Williams concluded, "to single out one kind of disability . . . is a new type of discrimination." 123 Cong. Rec. 29659 (1977) (remarks of Sen. Williams). In opposing the proposed 6-week cap, Senator Williams stated:

> The proposed amendment is directly contrary to the purpose and spirit of this legislation . . . . [T]he hallmark of Title VII, and of this legislation, is that it would require that all American workers be treated fairly by their employers. without regard to their sex, except insofar as it would affect their ability or inability to work. Any kind of arbitrary classification, such as that which would be established by this amendment, has no place in this legislation.

123 Cong. Rec. 29652 (1977) (remarks of Sen. Williams). Such a classification based on pregnancy merely creates a new form of discrimination and is contrary to the purpose of equal treatment.

> [T]his 6-week limitation for pregnancy coverage is a new discrimination . . . . [A] period of coverage for pregnancy disability is permitted if it is the approach used under other disabilities; but, when we specify one disability and say that this is the limitation of coverage, we are creating a new discrimination. I do not believe we can be part of that or should be part of it, because we would be furthering discrimination in the name of dealing with discrimination.
>
> . . .
>
> If [pregnancy] is the only classification, I say it is discrimination and want to be no part of it . . . .

123 Cong. Rec. 29653 (1977) (remarks of Sen. Williams). *See also* 123 Cong. Rec. 29654 (1977) (remarks of Sen. Javits) (New Jersey law with a similar 8-week limitation is "quite inconsistent with the legislative purpose we are seeking to serve here and with the federal law which we should have on the subject")

B. California Employers With Over Fifteen Employees Cannot Comply With Both State And Federal Law.

1. ***California Employers Who Comply With State Law Are Subject To Reverse Discrimination Suits Under Title VII Brought By Temporarily Disabled Males Who Do Not Receive The Same Treatment As Pregnant Employees.***

The United States Supreme Court has made it absolutely clear that an employer is liable for sex discrimination against its male employees if it grants preferential treatment to female employees disabled by pregnancy. In *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 462 U.S. ——, 77 L. Ed. 2d 89, 103 S. Ct. 2622 (1983), the Supreme Court held that an employer had engaged in sex discrimination against its male employees when it provided hospitalization benefits to pregnant employees but excluded

pregnancy coverage for all employees' spouses. The Court stated that in enacting the Pregnancy Discrimination Amendment to Title VII, Congress had rejected the reasoning in *Gilbert* that differential treatment of pregnancy is not gender-based discrimination. In holding that the male employees had been discriminated against because female employees received preferential treatment, the Court concluded:

> By making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee's sex.
>
> • • •
>
> The pregnancy limitation in this case violates Title VII by discriminating against male employees.

77 L. Ed. 2d at 103. The Court's decision unequivocally states that "[m]ale as well as female employees are protected against discrimination." 77 L. Ed. 2d at 101.

Here, the state law requires that an employer hold open a position vacated by an employee on a leave on account of pregnancy, childbirth, or related medical condition or fill it with a temporary replacement unless justified by a business necessity. In addition, the state law requires that the employee returning from a pregnancy leave be reinstated to her original or substantially similar job. There is no question that this law was enacted only to apply to females disabled by pregnancy and the legislative history is devoid of even a suggestion that employees disabled by other medical conditions should be given the same benefit under state law. If California employers comply with state law and provide preferential treatment to female employees disabled by pregnancy, those employers will violate the federal law requiring that pregnant females be reinstated to their positions *on the same basis* as employees returning from other disability leaves and will engage in unlawful discrimination against male employees.

2. *State Laws Which Mandate Preferential Treatment Of Females Are To Be Invalidated, Not Extended.*

In the late sixties and early seventies, a number of cases were decided concerning the validity of women's protective laws. Those cases are similar in many respects to the instant lawsuit in that preferential treatment for women was found to be preempted by the equal treatment mandate of Title VII. In those cases, it was frequently argued by the State that no conflict with federal law existed because employers could gratuitously extend the women's protective laws to male employees and thus eliminate differential treatment. The Ninth Circuit has rejected this argument.

In *Homemakers, Inc. v. Division of Industrial Welfare,* 509 F.2d 20 (9th Cir. 1974), *cert. denied,* 423 U.S. 1063 (1976), plaintiff sought injunctive and declaratory relief against enforcement of the provisions of the California Industrial Welfare Commission Wage Orders requiring that special overtime premiums be paid to women employees. In arguing that state law was not preempted, the State contended:

> that the challenged statutes and orders presented no inevitable conflict with federal law, since Homemakers could comply readily with both federal and state requirements by extending the benefits of the premium overtime pay legislation to its male as well as to its female employees.

509 F.2d at 22.

The Ninth Circuit, however, specifically rejected this argument, affirming the district court's holding:

> Similarly, the district court found that it would be beyond its own power to interpret the challenged statutes in a way which would significantly expand the statutorily designated class of beneficiaries. Although such an interpretation might provide the consistency

> between the challenged statutes and federal law necessary for upholding the former, it would usurp the legislative power vested exclusively in the state.

Id.

Thus, like the state law at issue here, the Wage Orders mandating preferential treatment conflicted with the equal treatment provisions of Title VII and were preempted by federal law.

Similarly, in *Burns v. Rohr Corp.,* 346 F. Supp. 994 (S.D. Cal. 1972), the defendant employer contended that the state regulation requiring employers to give women employees rest breaks was in conflict with Title VII and that the state regulation should be declared invalid as being preempted by the federal statute. It was argued that since the regulation in question was "beneficial," it should not be declared invalid because the employer could simply extend the benefit to male employees and thus obviate the conflict with Title VII's requirement of equal treatment of male and female employees. The court refused to extend the benefit, stating that "[a] federal court should not 'amend' the state's labor laws to obviate a conflict" (*Id.* at 997) and concluded that "the state regulation requiring rest breaks for women is contrary to the objectives of Title VII of the Civil Rights Act of 1964, and it is, therefore, preempted by Title VII by virtue of the Supremacy Clause." *Id.* at 998.

As stated in the noted treatise on employment discrimination law, "[m]ost courts since *Homemakers* have opted for invalidation not extension," and "[i]n our view the ultimate outcome of the extension versus invalidation issue will and should be invalidation." B. Schlei and P. Grossman, *Employment Discrimination Law* 369 (2d ed. 1983). The conclusion reached by the authors is succinctly stated as follows:

> If not extended, absent application of the BFOQ exception, a state law which either "requires or permits" sex discrimination is in conflict with and thereby preempted by Title VII under the Supremacy Clause of the U.S. Constitution."

Id. at 365 n.70.

Any argument that the state laws and agency enforcement policy at issue here are "beneficial" laws for females and that plaintiff can simply extend those benefits to male employees and eliminate the conflict with Title VII must clearly be rejected. It is not the function of the federal courts to rewrite state law which conflicts with federal law. This is especially true where the financial and administrative burdens which would be placed upon employers are so great. To require extension of the policies here would require employers to hold open all positions vacated by employees on disability leaves for up to four months or temporarily fill the positions and guarantee reinstatement to all employees returning from a disability leave of whatever nature.

CONCLUSION

It is respectfully submitted that the legal issues presented by this case are clear and straightforward. California Government Code Section 12945(b)(2) and the enforcement policies of defendants require California employers to discriminate on the basis of sex by holding open the jobs of females disabled by pregnancy, childbirth or related medical conditions during the term of their disability leaves and by compelling the reinstatement of those employees even though employees disabled by other medical conditions do not enjoy those same rights. The EEOC succinctly stated the controlling Title VII principle in its brief to the Supreme Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC:*

> As the most comprehensive federal fair employment statute ever enacted, Title VII invests in all workers, men as well as women, the right to be free of discriminatory treatment in the work place. It prohibits the employment of men, as well as women, under terms and conditions less favorable than those accorded similarly-situated members of the opposite sex and, conversely, forbids preferential treatment of women as well as men on the basis of their sex.[4]

The California state law clearly conflicts with the equal treatment mandate of federal law and requires preferential treatment of females. The conclusion is inexorable—the state law is preempted by Title VII under the Supremacy Clause.

DATED: February 15, 1984.

GIBSON, DUNN & CRUTCHER
JEROME C. BYRNE
WILLARD Z. CARR, JR.
PAMELA L. HEMMINGER
JAN E. EAKINS

By: /s/ PAMELA L. HEMMINGER
Pamela L. Hemminger

Attorneys for Plaintiffs
California Federal Savings and
Loan Association, Merchants and
Manufacturers Association and
the California Chamber of
Commerce

---

[4] Brief of the EEOC in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* reprinted at *BNA's Law Reprints, Labor Law Series,* Volume 16, No. 25, 1982/83 Term, p. 179.

EXHIBIT A

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA

Case No. FEP81-82 D8-0327s
L-29780
84-05

In the Matter of the Accusation of

THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,

v.

HYMAN-GOLDBERG, dba
DYN-AURA ENGINEERING LABORATORIES,

Respondent,

BRENDA JOYCE WATT,

Complainant.

DECISION

This case was heard on behalf of the Fair Employment and Housing Commission ("Commission") by Administrative Law Judge Michael C. Cohn at San Diego, California, on July 28, 1983. Jess J. Gonzales, directing attorney, represented the Department of Fair Employment and Housing ("Department"). There was no appearance by or on behalf of respondent Hyman Goldberg, dba Dyn-Aura Engineering Laboratories. Brenda Joyce Watt ("complainant") was present. On proof of compliance with Government Code sections 11505 and 11509, the hearing proceeded as a default pursuant to Government Code section 11520.

A written transcript of the hearing was received by the Commission on August 8, 1983, and the proposed decision was received from the Administrative Law Judge on August 9, 1983. The Commission issued a Notice of Opportu-

nity for Further Argument on September 15, 1983. Briefs in further argument were received from the respondent on September 28, 1983 and from the Department on October 6, 1983. The brief from respondent was read and the legal arguments considered although the matter had proceeded by default at the hearing level.

After consideration of the entire record, the Commission hereby makes the following Findings of Fact and Determination of Issues:

FINDINGS OF FACT

1. On February 2, 1982, Brenda Joyce Watt filed a verified complaint with the Department alleging that she had been discriminated against by her employer on the basis of her sex on January 29, 1982, when she was told she could not return to work after her maternity leave, but was instead being terminated.

2. On January 25, 1983, the Department filed a petition for an order compelling discovery in the San Diego Superior Court.

3. On March 24, 1983, San Diego Superior Court Judge William Todd ordered respondent to comply with the Department's discovery request by responding to the Department's First Set of Interrogatories and Request for Production of Documents in Connection Therewith. No compliance period was specified in the final order.

4. On April 19, 1983, respondent partially complied, but as of May 9, 1983, respondent had not fully complied with the order to answer the interrogatories, and in fact has never fully complied, and therefore the Department never certified compliance with the court's order.

5. On May 18, 1983, Mark Guerra, in his official capacity as the director of the Department, caused an accusation to be issued against the respondent.

6. Hyman Goldberg, dba Dyn-Aura Engineering Laboratories, is an employer within the meaning of Government Code section 12926, subdivision (c). The total number of assemblers during the time at issue was approximately 12. There was no evidence provided of the total number of employees.

7. Complainant was first employed by respondent as an assembler of hearing aid amplifiers in 1978. She was subsequently promoted to the position of lead person. Her duties in that position, in addition to the assembly of amplifiers, included obtaining parts for the assembly line, doing paperwork and assigning tasks to the assemblers. She occupied the position of lead person for approximately two years prior to the commencement of her maternity leave in November 1981.

8. In April 1981, complainant advised Mrs. Hyman Goldberg that she was pregnant and would need maternity leave in the future. Mrs. Goldberg was the wife of the respondent and the person in charge of the day-to-day operation of the business.

9. The only other pregnant employee of respondent complainant knew about had not taken a maternity leave, but had quit instead. Complainant therefore asked Mrs. Goldberg whether she would be able to return to her job following her maternity leave and was advised that she would be able to return.

10. Prior to complainant's pregnancy, respondent, which does not provide its employees with sick leave, had allowed the complainant to visit the doctor while only being docked in pay for the time actually missed. After complainant communicated her pregnant status, however, she noticed that Mrs. Goldberg's attitude changed; Mrs. Goldberg became hostile, and no longer allowed complainant to visit the doctor on the same terms. Instead, complainant was required to take a whole day off from work each time she

had a doctor's appointment, even if the doctor's appointment itself only took an hour-and-a-half.

Complainant was also told to train all the other assemblers in all aspects of her job duties. She thought this instruction strange because she didn't expect to be gone long, but she complied.

11. Shortly before November 20, 1981, the complainant was told by her doctor that she should begin her maternity leave. On November 20, 1981, the complainant commenced her maternity leave. On that date, her employer required her to fill out a form which asked: "Why is employee leaving?" Complainant wrote in the words "maternity leave." She asked if that was properly done, and was told it was.

12. Complainant's baby was born on December 20, 1981, by caesarean section. Because of the caesarean section, the complainant was required by her doctor to remain on maternity leave for approximately six more weeks, until January 29, 1983. Her total time on leave was approximately ten weeks.

13. On January 29, 1982, complainant's doctor cleared her to return to work. Complainant went directly from the doctor's office to her employer's office. Mr. and Mrs. Goldberg were out to lunch when the complainant arrived, so the complainant told their daughter Joanie that she had come to inform them that her doctor had cleared her to return to work. Joanie told complainant to go home and call them around 1:00p.m.

Complainant called at about 1:00p.m. and asked to speak to Mrs. Goldberg. She was instead transferred to Mr. Goldberg. When she told him that her doctor had cleared her to return to work, Mr. Goldberg told her that her job had been terminated, that her position wasn't there, and that she was no longer needed.

When she protested that Mrs. Goldberg had told her that she could come back to her postion after the baby was born, and that she had not quit, but was on leave, he reiterated that her job was no longer there, that she was no longer needed.

14. Respondent did not offer complainant an alternative job, but told her that if a position became available on the assembly line she could fill that position at a lower rate of pay—$4.00 per hour.

Complainant was never subsequently called by anyone at Dyn-Aura to fill any vacancy, although the evidence established that two new assemblers were hired, one on February 1, 1982 and one on February 6, 1982. Each of these assemblers was paid at the rate of $3.35 per hour.

15. Complainant was upset by her conversation with Mr. Goldberg and felt that she had been treated unfairly. Furthermore, she had enjoyed her position as lead assembler and felt herself to be a loyal employee.

She felt "crushed" and "hurt" when she was not allowed to return to her job with respondent.

16. In November 1981, prior to commencing her maternity leave, complainant earned $5.00 per hour and worked a 40 hour week.

Complainant subsequently applied for and received unemployment benefits as the result of the termination of her position with respondent. She received unemployment insurance for approximately two weeks.

Complainant found a new job which began on February 22, 1982. She was initially paid $4.00 per hour on this new job. This increased to $4.30 per hour around June 1982; $4.59 per hour in September 1982; and $5.48 per hour on July 4, 1983.

DETERMINATION OF ISSUES

Procedural Questions

Motion to Dismiss for Failure to Issue a Timely Accusation

In his further argument, respondent moved to dismiss the accusation on the basis that the accusation was not issued in a timely manner. In support of this argument, respondent points out that Government Code section 12965, subdivision (a) provides, in pertinent part, that an accusation shall be issued, if at all, within one year after the filing of a complaint. The complaint in this case was filed on February 2, 1982; the accusation was issued on May 18, 1983, one year and three months after the complaint was filed.

In response, the Department first correctly points out that, since the respondent failed to file a Notice of Defense and failed to appear at the hearing, his further argument may only be viewed as information on mitigation pursuant to Government Code section 11520, and not as evidence to rebut the charges in chief. We believe, however, that the language of section 11520 permitting respondent to make *any showing* by way of mitigation extends to a showing of procedural defects which exist in the record of the case.[1]

The Department next argues that, with regard to the timeliness of the accusation, Government Code section 12963.5, subdivision (f) is controlling.[2]

---

[1] Government Code section 11520 provides that: (a) If the respondent fails to file a Notice of Defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; (b) Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.

[2] Government Code section 12963.5 provides the method by which the Department may compel discovery through petition to the

This subdivision provides in pertinent part that the period of time within which the Department is directed to file an accusation by section 12965 shall be extended by the length of the period between the filing of a petition for discovery under section 12963.5 and the filing by the Department of a certified statement indicating the respondent's compliance with the order of the superior court granting the petition.

The record indicates that the Department did file such a petition on January 25, 1983, within one year after the filing of the complaint. The petition was granted on March 24, 1983, but the respondent has never fully complied with the court's order to answer the Department's interrogatories. Because the respondent has never fully complied, the Department has never been able to certify to the court that the respondent has fully complied. Therefore, the Department argues, the period for filing the accusation continues even to this day if measured under the standard set out in Government Code section 12963.5, subdivision (f).

Since the filing of the petition for discovery on January 25, 1983, occurred within the one year period, and, under the terms of Government Code section 12963.5(f), has been extended, the filing of the accusation on May 18, 1983 was a valid filing.

---

superior court. Subdivisions (c) provides in part that, if the court order grants the petition for discovery, the order shall set forth the manner in which respondent shall comply and the period within which such compliance is required.

Subdivision (e) provides in part that, within 15 days after the end of the compliance period specified in the final order of the superior court, the Department must certify to the court in writing either that the order has been complied with or that the respondent has failed to comply.

The motion to dismiss is therefore denied.[3]

Discrimination

Government Code section 12945, subdivision (a) and (b) provide in pertinent part:

> It shall be an unlawful employment practice . . . (a) For any employer, because of pregnancy, childbirth, or related medical condition of any female employee . . . to discharge her from employment . . . or to discriminate against her in compensation or in terms, conditions, or privileges of employment . . . (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . .
>
> . . .
>
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy childbirth, or related medical conditions.

Failure to Provide Right of Return After Mandated Leave

We note preliminarily that the Commission has previously held that employees on pregnancy disability leave as mandated by Government Code section 12945(b)(2) have a right to return to their same or similar position at the end of that leave. *DFEH* v. *Travel Express* (1983) FEHC Dec. No. 83-17, at p. 8; [1982-83 CEB 16]. The reason for this holding is, of course, that the term "leave" carries

---

[3] Respondent also contends that the charges in the complaint are at variance with those contained in the accusation, and the accusation is therefore invalid. This contention has no factual or legal basis.

within it the connotation of permission to be absent from work for a certain period of time without a change in one's work status as a result of that absence.

In this case, the evidence established the following:

The complainant was employed as a lead assembler for two years prior to commencing her pregnancy leave in November 1981. When she requested leave, she was told she could have it, but was instructed to train the other assemblers to perform all her duties, including those she performed in her capacity as lead assembler. Although she was told she could return to her job at the end of her leave at the time she first requested the leave, when she notified her boss on January 29, 1982, that her doctor had released her to return to work, she was told her job "no longer existed."

She was not offered any job at that time, but she was told that, if at some time in the future a lower paying assembler job opened up, she could come back at the rate of $4.00 per hour instead of the $5.00 per hour she had been making as a lead assembler. Although the evidence established that within 10 days of this conversation, the employer hired two new assemblers, the complainant was never allowed to return to work.

Respondent's refusal to permit the complainant to return to work following the mandated leave constitutes a violation of Government Code section 12945(b) unless the employer establishes a permissible defense. Since the respondent did not afford himself of the opportunity to appear at the hearing and present evidence,[4] we conclude that a violation of 12945(b)(2) has occurred.[5]

[4] The respondent's attempt to introduce factual material in his further argument and other correspondence with the Commission on this matter may not be considered as evidence on the issue of whether discrimination actually occurred. The reason is that this material was not introduced at the hearing, which is, absent a stipulation by the parties to the contrary, the only proper place for the introduction of evidence under Government Code section 11513. Any ruling to the contrary would deprive the Department of its right to cross-examination.

Remedies

Government Code section 12970, subdivision (a) provides in pertinent part, as follows:

> If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall issue . . . an order requiring such respondent to cease and desist from such action, including, but not limited to . . . reinstatement . . . with or without back pay . . . as, in the judgment of the commission, will effectuate the

[5] Government Code section 12945, subdivsion (a), makes it a separate violation to discriminate against a female employee because of pregnancy in *terms, conditions or privileges of employment.* In this case, the complainant testified that, prior to her pregnancy, if she needed to visit a doctor, she would be permitted to take off work for that purpose and would be docked for only the amount of time she needed to be gone to complete her visit to the doctor. After she became pregnant and asked for pregnancy leave, however, she was required to take a whole day off without pay each time she needed to visit her doctor for a checkup.

This evidence raises the inference that complainant was treated in a less favorable manner in the terms, conditions and privileges of her employment as a result of her pregnancy. This inference was unrebutted by the respondent who failed to appear at the hearing and introduce evidence on this issue, therefore we conclude that the complainant was discriminated against in the terms, conditions and privileges of her employment as a result of her pregnancy in violation of the statute. We note, however, that the Department did not establish the amount of damages related to this violation.

purposes of this part, and including a requirement for report of the manner of compliance.

The Department in this case is seeking reinstatement of the complainant to the job of lead assembler with the seniority, rate of pay and other employment benefits that she would have if she had not been denied the right to return to her job; back pay; compensatory and punitive damages.

Reinstatement

Since, as the Commission has held, the right to pregnancy leave necessarily includes the right to return to work, reinstatement is the single most appropriate form of relief in cases of this sort, and the Department's request for reinstatement in this case shall be granted.

Back Pay

Section 7286.0 subdivision (a)(1)(A) of the Commission's regulations[6] provides that "mitigating circumstances," including interim earnings (but not employment compensation), may be considered in determining the amount of back pay to be awarded a complainant.

In this case, prior to the commencement of her pregnancy leave, the complainant worked a 40 hour week and earned $5.00 per hour. Her back pay period extends from January 29, 1982, the date she informed her employer that her doctor indicated she could resume work, through July 4, 1983, when her wages on her new job exceeded the $5.00 per hour she had been earning. Her back pay entitlement consists of her lost wages less her interim earnings.[7]

---

[6] The Commission's regulations are found in Title 2 of the California Administrative Code.

[7] We note that any uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating party. *Harrison v. McLean Trucking Co.*, 520 F.2d 326, 223 (4th Cir. 1975); 494 F.2d 211, 260-261 (5th Cir. 1969). We therefore conclude, in the absence of evidence from the employer to the contrary, that the best measure of the complainant's lost wages is the hourly rate she earned prior to the commencement of her leave. Any other hourly rate would be speculative at best, notwithstanding the employer's statement to the complainant that her job as lead assembler "no longer existed." This was a mere heresay statement, and insufficient by itself to support a finding of fact. (Gov.Code § 11513,(c).)

The amount due her may be computed as follows:

January 29, 1982 through February 21, 1982

The complainant was unemployed during this three week period and therefore is entitled to $600 ($5.00 per hour times 40 hours per week times three weeks).

February 22, 1982 through May 31, 1982

The complainant was paid $4.00 per hour during this 14 week period and therefore is entitled to $560.00 ($1.00 per hour times 40 hours per week times 14 weeks).

June 1, 1982 through August 21, 1982

The complainant was paid $4.30 per hour during this 12 week period and therefore is entitled to $336.00 ($.70 per hour times 40 hours per week times 12 weeks).

September 1, 1982 through July 3, 1983

The complainant was paid $4.59 per hour during this 43 week period and therefore is entitled to $705.20 ($.41 per hour times 40 hours per week times 12 weeks).

The complainant's total back pay entitlement, therefore, is $2,201.20.[8]

---

[8] We note the Department did not establish a monetary value for the amount of wages lost as a result of the respondent's discrimi-

Compensatory Damages

The Commission first gave notice that it would exercise its authority to award compensatory damages in employment discrimination cases in section 7286.9, subdivision (c) of its regulations. In *DFEH* v. *Ambylou Enterprises* (1982) FEHC Dec. No. 82-06, we held, at p. 9, that the function of compensatory damages in employment discrimination cases is to compensate the complainant for the intangible, but nonetheless very real, injury suffered as a consequence of respondent's actions in the form of emotional distress.

In this case, we have the complainant's testimony that she was upset by her conversation with Mr. Goldberg on January 29, 1982, when he told her that she could not return to work, and that she felt that she had been treated unfairly. She felt "crushed" and "hurt," especially since since she had enjoyed her job and considered herself a loyal employee.

It is up to the trier of fact to determine a reasonable amount of compensation for emotional distress. (*DFEH* v. *Ambylou Enterprises, supra,* FEHC Dec. No. 82-06, at p. 11.) Based on the evidence, we conclude that a reasonable amount of compensation in this case is $1,000.

Punitive Damages

Punitive damages, unlike back pay and compensatory damages, are not part of a "make-whole" remedy for discrimination. Rather, the purpose of punitive damages is to punish the wrongdoer and to provide an example to deter others from similar conduct. (*DFEH* v. *Ambylou Enterprises, supra,* FEHC Dec. No. 82-06, at at p. 13.) Under Civil Code section 3294, which the Commission has adopted

---

natorily requiring complainant to take a whole day off without pay each time she had a doctor's check-up during her pregnancy. In this absence of proof we award no back pay for that violation.

as its standard for awarding punitive damages, such damages may be awarded when the employer is personally guilty of malice or oppression. As used in that section, malice and oppression are defined as follows:

> (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.
>
> (2) 'Oppression' means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

In addition, the new college edition of the *American Heritage Dictionary of the English Language* (Houghton Mifflin, 1976) defines the verb "to oppress" as follows:

> "1. To subjugate or persecute by unjust or tyrannical use of force or authority.
>
> "2. To weigh heavily upon, especially so as to depress the mind or spirits. . . .
>
> "3. *Obsolete.* To overwhelm or crush."

Based on the evidence in this case, we conclude that the respondent is guilty of malice and oppression. In the first place, when Mrs. Goldberg told the complainant she could take a maternity leave and return to her former job at its conclusion, and Mr. Goldberg later denied her that right despite his knowledge of the promised right of return, he was engaging in conduct which he knew would injure the complainant, with a conscious disregard of her rights. We might add that requiring the complainant to take a full day off without pay each time she was required to visit the doctor clearly subjugated her to an unjust and tyrannical use of authority. That the sum total of this behavior was oppressive to the complainant was revealed in her

choice of words to describe her reaction to it all: She was "crushed."

Although no evidence was introduced with regard to the respondent's net worth, we infer from the evidence that the respondents are the owners of a going concern that employs at least 12 people. We therefore conclude that they are not without means to pay an award of punitive damages. Many cases have also held that the amount of punitive damages should bear a "reasonable relationship" to complainant's actual damages. (See *DFEH* v. *Ambylou Enterprises, supra* FEHC Dec. No. 82-06, at p. 17.) In this case, the complainant's actual loss in back pay alone was more than $2,000. We therefore conclude that a punitive damages award of $2,000 is not excessive.

ORDER

1. Respondent Hyman Goldberg, dba Dyn-Aura Engineering Laboratories, shall cease and desist from its practice of discrimination against its female employees because of pregnancy.

2. Respondent Hyman Goldberg, dba Dyn-Aura Engineering Laboratories, shall immediately offer to reinstate complainant Brenda Joyce Watt to the position of lead assembler with all the seniority she would have accrued had she not been terminated and with all other benefits attendant thereto. This offer shall remain open for thirty (30) days or until prior acceptance or rejection.

3. Within sixty (60) days of the effective date of this decision, respondent Hyman Goldberg shall pay to complainant Watt $2,201.20 in back pay, plus interest thereon at the rate of seven percent from January 29, 1982 through December 31, 1982, and 10 percent thereafter in accordance with section 685.010(a) of the Code of Civil Procedure.

4. Within sixty (60) days of the effective date of this decision, respondent Hyman Goldberg shall pay to complainant Watt $1,000 in compensatory damages and $2,000 in punitive damages plus interest thereon at the annual rate of 10 percent from the effective date of the decision until paid.

5. Within sixty (60) days of the effective date of this decision, respondent shall develop a pregnancy leave policy in conformity with State law and shall provide information regarding said policy to its employees.

6. Within sixty (60) days of the effective date of this decision, respondent Hyman Goldberg, dba Dyn-Aura Engineering Laboratories shall report to the Commission in writing the manner of the compliance with this order.

NOTE: Judicial review of this decision may be obtained by filing a Petition for Writ of Mandate in accordance with section 1094.5 of the Code of Civil Procedure and section 11523 of the Government Code. All documents relating to any such petition shall be served on the Commission and each opposing party.

DATED: February 2, 1984

FAIR EMPLOYMENT AND HOUSING COMMISSION

/s/ Illegible

/s/ Illegible

/s/ Illegible

GIBSON, DUNN & CRUTCHER
JEROME C. BYRNE
WILLARD Z. CARR, JR.
PAMELA L. HEMMINGER
JAN E. EAKINS
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Plaintiffs
California Federal Savings and
Loan Association, Merchants
and Manufacturers Association,
and California Chamber of
Commerce

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Hearing

Date: March 19, 1984
Time: 10:00 a.m.
Place: Courtroom 14

TABLE OF CONTENTS

Page

I. INTRODUCTION JA-104

II. RELIANCE ON AN ADVERSE IMPACT THEORY OF DISCRIMINATION DOES NOT RECONCILE THE STATE LAW'S CONFLICT WITH TITLE VII JA-106

A. The Plain Language And The Legislative History Of The PDA Require That Employees Disabled By Pregnancy-Related Conditions Be Treated The Same As Employees Disabled By Other Medical Conditions JA-107

B. The EEOC Guidelines Provide That Employers Are Not Required To Grant Preferential Reinstatement Rights To Pregnant Workers And Mandate The Same Treatment JA-109

C. An Employer's Failure To Extend A Benefit To Employees Disabled By Pregnancy, Childbirth, Or Related Medical Conditions Does Not Violate Title VII JA-111

III. DEFENDANTS' ABSOLUTE REQUIREMENT OF REINSTATEMENT REQUIRES DISPARATE TREATMENT OF MALE EMPLOYEES JA-114

A. It Has Not Been Established That The Failure To Guarantee Reinstatement Has An Adverse Impact On Female Employees.JA-114

B. Defendants' Requirement Of Guaranteed Reinstatement Is Absolute And Extends To All Employers Even If No Disparate Impact Exists JA-115

TABLE OF CONTENTS
(Continued)

Page

C. Sex-Based Classifications Violate Title VII JA-116

IV. Title VII Does Not Simply Require That Women Disabled by Pregnancy Be Provided With no Less Benefits Than Employees Disabled by Other Medical Conditions—It Also Prohibits Discrimination in Their Favor ...JA-120

V. A Mere Reference to a State Law Which Provides Preferential Tteatment Does Not Indicate Legislative Approval of That Law .JA-122

VI. Regulations of Federal Agencies Applicable to Recipients of Federal Funds and Government Contractors Do Not Alter the Requirements of Title VII and the PDA JA-124

VII. Conclusion JA-126

TABLE OF AUTHORITIES

Page(s)

Cases

Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981) JA-113

Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945) JA-119

Arizona Governing Committee v. Norris, —— U.S. ——, 77 L. Ed. 2d 1236, 103 S. Ct. 3492 (1983) .JA-104, 105, 117, 118

Crown Zellerbach Corp. v. Marshall, 441 F. Supp. 1110 (E.D. La. 1977) JA-126

Department of Fair Employment v. Travel Express, Case No. FEP80-81, A7-09925, N-18709, 83-17 ..... JA-115, 116

Department of Fair Employment and Housing v. Hyman Goldberg, dba Dyn-Aura Engineering Laboratories, Case No. FEP 81-82, D8-03725, L-29780, 84-05 .....JA-116

Franchise Tax Board v. Construction Laborers Vacation Trust, —— U.S. ——, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983) JA-124

General Electric Co. v. Gilbert, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976) .. JA-107, 112, 125, 126

Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971) JA-106

Homemakers, Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied,* 423 U.S. 1063 (1976) JA-116, 117

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) JA-124

TABLE OF AUTHORITIES
(Continued)

Page(s)

Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977), *cert. denied*, 431 U.S. 917 (1977) JA-112

Jones v. Rath Packing Co., 430 U.S. 519, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977) JA-119, 120

Miller-Wohl Co. v. Commissioner of Labor and Industry, 685 F.2d 1088 (9th Cir. 1982) JA-124

Mitchell v. Board of Trustees, 599 F.2d 582 (4th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979) ..JA-112

Nashville Gas Co. v. Satty, 434 U.S. 136, 54 L. Ed. 2d 356, 98 S. Ct. 347 (1977) JA-112, 113

Newport News Shipbuilding & Dry Dock Company v. EEOC, 462 U.S. —— 77 L. Ed. 2d 89, 103 S. Ct. 2622 (1983) JA-106, 120, 121

North Haven Board of Education v. Bell, 456 U.S. 512, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982) ..JA-125

Ray v. Atlantic Richfield Co., 435 U.S. 151, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978) JA-120

Reeves v. Brand-Name Fashion Outlet, 532 F. Supp. 32 (W.D. Tenn. 1982) JA-112

United States v. East Texas Motor Freight System Inc., 564 F.2d 179 (5th Cir. 1977) JA-125

United States v. Truck Management, Inc., 662 F.2d 36 (D.C. Cir. 1981) JA-125

Federal Statutes

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e(k) JA-104, 107

Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 ..... JA-104, 107

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* JA-125

TABLE OF AUTHORITIES
(Continued)

Page(s)

State Statutes

Alaska Statutes § 18.80.220(1) JA-123

California Govt. Code § 12945(b)(2) JA-114, 126

Maryland Annotated Code, Art. 49B, § 17 .....JA-123

Minnesota Laws §§ 363.01(29) and 363.03(5) JA-123

Oregon Revised Statutes § 659.029 .....JA-123

Other

Brief for the Equal Employment Opportunity Commission, *Newport News Shipbuilding & Dry Dock Company v. EEOC, reprinted in BNA's Law Reprints, Labor Law Series*, Volume 16, No. 25, 1982/83 Term, p. 161 .....JA-121

29 C.F.R. § 1604.10(b) JA-110

29 C.F.R. § 1604.10(c) JA-109

29 C.F.R. Part 1604 (Appendix) JA-110, 111

123 Cong. Rec. 10582 .....JA-108

EEOC Compliance Manual § 676.4, *reprinted in* EEOC Compliance Manual (CCH) ¶ 4804 .....JA-111

Executive Order 11246 .....JA-124

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978) *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749 ..... JA-108, 109, 115, 122

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) *reprinted in* BNA, "Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964," p. 154 (1978) JA-108, 109

B. Schlei and P. Grossman, *Employment Discrimination Law*, "Conflicts Between the Executive Order and Title VII," pp. 915-16 (2d ed. 1983) .JA-125

L. Tribe, *American Constitutional Law* (1978) JA-119

I.

INTRODUCTION

The state law at issue here imposes an absolute requirement that, in all instances, an employer must guarantee reinstatement to a female returning from a pregnancy disability leave unless the employer can demonstrate business necessity. In recognition of the fact that a law which requires preferential treatment of female employees discriminates against males on the basis of sex, defendants attempt to justify the state's requirements by arguing that the requirement of guaranteed reinstatement was adopted to eliminate the adverse impact on women by the failure to guarantee reinstatement. Defendants, however, ignore the fact that to require preferential treatment of females is to require disparate treatment of male employees.

Defendants' argument flies directly in the face of the express language of the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076, which provides, *inter alia,* that "women affected by pregnancy, childbirth or related medical conditions shall be treated the *same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ." 42 U.S.C. § 2000e(k). Their argument is also directly contradicted by the Guidelines of the Equal Employment Opportunity Commision ("EEOC") and ignores the legislative history of the PDA which is remarkably clear.

Even if an employee could bring a disparate impact case under the PDA claiming that an individual employer's reinstatement policy has a disparate impact on women, it most certainly does not follow that the state may conclusively determine that, in all instances, an employer must guarantee reinstatement to females returning from a disability leave. Such a law is in clear conflict with Title VII; as recently recognized by the Supreme Court in *Arizona*

Governing Committee v. Norris, —— U.S. ——, 77 L. Ed. 2d 1236, 1248, 103 S. Ct. 3492 (1983), "even a true generalization about a class cannot justify class-based treatment" under Title VII. All the disparate impact cases cited by defendants involve situations where an individual employer's policy is scrutinized for disparate impact on that employer's employees. No authority whatsoever exists for the proposition that a state may conclusively require preferential treatment of females and justify discrimination against males by vague statements that the purpose of the law is to avoid adverse impact on females. The state is free to eliminate perceived adverse impact by requiring that *all* employees, male and female, must be guaranteed reinstatement; it may *not* require discrimination.

Moreover, it has never been demonstrated that the failure to guarantee reinstatement has an adverse impact on females. The state statute speaks only of leaves of absence, not reinstatement. Many employers such as Cal Fed do not guarantee reinstatement but provide certain rights resulting in the immediate return to work of the vast majority of employees, both male and female. There is no basis whatsoever for the state to conclusively presume that such policies have an adverse impact on females. The state has not stated that if a disparate impact case can be made under Title VII, in an *individual* case, a similar case can be brought under state law. It has established and dignified by law a conclusive and invidious classification based upon sex; such a law conflicts with Title VII and is invalid under the Supremacy Clause. The citation of page after page of cases for the undisputed proposition that the disparate impact theory has been recognized under Title VII in individual cases and page after page of sociological studies and data concerning pregnancy does not change this result.

The argument of defendants that the PDA simply requires that women disabled by pregnancy receive no *less*

benefits and that it is permissible to require preferential treatment deserves short shrift. This argument has been rejected by the U.S. Supreme Court in *Newport News Shipbuilding & Dry Dock Company v. EEOC,* 462 U.S. ——, 77 L. Ed. 2d 89, 103 S. Ct. 2622 (1983).

There is no support for the proposition that Congress approved of state laws requiring preferential treatment of pregnancy. That federal agencies regulating the practices of government contractors and of educational institutions receiving federal funds may have enacted regulations is of no relevance whatsoever to the prohibitions contained in Title VII and the PDA. The OFCCP, in particular, has historically taken the position that its regulations and practices need not parallel Title VII.

When one removes the gloss of the state's alleged good intentions, the fact remains that the PDA and the EEOC require that employees disabled by pregnancy be accorded the *same* reinstatement rights as other employees. By fiat, defendants have established a sex-based classification and purport to require California employers to discriminate on the basis of sex. Such a result is in conflict with Title VII and defendants must be enjoined from enforcing this state law.

II.

RELIANCE ON AN ADVERSE IMPACT THEORY OF DISCRIMINATION DOES NOT RECONCILE THE STATE LAW'S CONFLICT WITH TITLE VII.

Plaintiffs do not dispute that a prima facie violation of Title VII may be shown in certain circumstances where an individual employer's policy has an adverse impact on a protected group. The validity of *Griggs v. Duke Power Co.,* 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971), is certainly not at issue. Defendants' reliance on disparate impact here, however, is contradicted by the plain language

and the legislative history of the PDA, by the EEOC regulations, and by the United States Supreme Court.

A. The Plain Language And The Legislative History Of The PDA Require That Employees Disabled By Pregnancy-Related Conditions Be Treated The Same As Employees Disabled By Other Medical Conditions.

In arguing that pregnant employees must be accorded preferential reinstatement rights following a disability leave, defendants ignore the plain meaning of the language of the PDA which provides that "women affected by pregnancy, childbirth or related medical conditions shall be treated *the same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (emphasis added). In enacting the PDA, Congress recognized that employment policies which differentiate between pregnant and non-pregnant employees and are arguably sex-neutral on their face, nonetheless have an adverse impact on women. In *General Electric Co. v. Gilbert,* 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976), the Supreme Court had held that discrimination because of pregnancy was not sex discrimination and had noted that no evidence of adverse impact on female employees had been presented. 429 U.S. at 137. The intent of Congress in enacting the PDA was clearly to overrule *Gilbert* and establish a *per se* rule that distinctions and classifications based on pregnancy have an adverse impact on female employees and, therefore, violate Title VII. As noted in the House Committee Report,

> H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the commonsense view and to ensure that working women are protected against all forms of employment discrimination based on sex. By making clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need in most instances to rely

on the impact approach, and thus would obviate the difficulties in applying the distinctions created in *Satty*.

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4751.

Thus, the PDA mandates equal treatment in order to overcome the adverse effect on female employees of pregnancy-based classifications. The House Committee Report unmistakably confirms that the PDA requires only that pregnant employees be treated the same as other employees based on their ability to work:

> *It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment.* Therefore, it does not require employees to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. H.R. 6075 in no way requires the institution of any new programs where none currently exist. *The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.*

H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. (1978, *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4752 (emphasis added). *See also* S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) *reprinted in* BNA, "Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964," p. 154 (1978) ("Basic to all . . . applications is that the bill . . . prohibits only discriminatory treatment"); 123 Cong. Rec. 10582 (1977) (remarks of Rep. Hawkins) ("It is also important to understand what this bill would not do. Like Title VII generally, it merely requires that employers not discriminate.").

B. The EEOC Guidelines Provide That Employers Are Not Required To Grant Preferential Reinstatement Rights To Pregnant Workers And Mandate The Same Treatment.

Defendants also ignore the plain language of the EEOC Guidelines on Sex Discrimination. These Guidelines predate the PDA, in part, and were expressly approved in the House and Senate Committee Reports on the PDA.[1] The Guidelines limit disparate impact analysis to circumstances in which a no leave or insufficient leave policy results in the termination of an employee. See 29 C.F.R. § 1604.10(c) ("Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act *if* it has a disparate impact on employees of one sex and is not justified by business necessity.") (emphasis added).[2]

The Guidelines also specify those areas where preferential treatment is precluded and the same treatment is mandated. Policies or practices involving reinstatement must afford the same treatment to pregnancy-related disabilities as to other medical disabilities.

> Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, *reinstatement*, and payment under any health or dis-

---

[1] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4750; S. Rept. No. 95-331, 95th Cong., 1st Sess. (1977).

[2] While plaintiffs do not necessarily concur with this particular guideline, it is not at issue in this case. What is at issue is the requirement of guaranteed reinstatement in all cases. Cal Fed's policy, for example, provides for disability leaves of up to at least six months.

ability insurance or sick leave plan, formal or informal, *shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.*

29 C.F.R. § 1604.10(b) (emphasis added).

The "Questions and Answers on the Pregnancy Discrimination Act" promulgated by the EEOC also clearly mandate the same treatment for pregnancy-related disabilities:

> The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. . . . If other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy.

29 C.F.R. Part 1604 (Appendix).

Question No. 9 specifically addresses the reinstatement issue.[3]

> 9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?
>
> A. Unless the employee has informed the employer that she does not intend to return to work, *her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.*

Question and Answer No. 9, C.F.R. Part 1604 (Appendix) (emphasis added). *See also* EEOC Compliance Manual, § 676.4, "Right to Work," *reprinted in* EEOC Compliance Manual (CCH) ¶ 4804 (12-83) (emphasis added) ("the employer must afford the *same reinstatement opportunities* to employees on leave because of pregnancy-related disabilities").

[3] The other Questions and Answers demonstrate that the same treatment is required for pregnancy-related disabilities. *See, e.g.*, Question and Answer No. 10 ("employer's seniority policy must be the same"); Question and Answer No. 16 ("benefits for long-term disabilities . . . must be provided to the same extent"); Question and Answer No. 17 ("employer must provide same benefits for those on leave"); Question and Answer No. 22 ("level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical condition of the spouses of female employees").

For a federal court to hold, as defendants ask the Court to do, that failure to guarantee reinstatement to a female returning from pregnancy leave has an adverse impact on women in all cases as a matter of law would be to hold that the EEOC Guidelines and the Questions and Answers on Pregnancy, requiring the same treatment of females disabled by pregnancy and employees disabled by other medical conditions, must be struck down as invalid. Such a ruling would disregard the Senate and House Committee Reports and clear legislative history. If failure to guarantee reinstatement to women returning from a pregnancy disability leave violates Title VII in all instances because of adverse impact, it would not be clearly provided that the same treatment is required with respect to reinstatement.

C. An Employer's Failure To Extend A Benefit To Employees Disabled By Pregnancy, Childbirth, Or Related Medical Conditions Does Not Violate Title VII.

Contrary to defendants' contention, Title VII does not require an employer to extend a benefit to employees disabled by pregnancy-related conditions even if the failure

to extend the benefit would result in an adverse impact on pregnant employees on the theory that only women become pregnant. To find otherwise leads to absurd results because failure to extend any benefit relating to illness or pregnancy would always arguably have an adverse impact on pregnant employees. The "logic" of such a finding would support a state law mandating an employer to provide *paid* leaves of absence to women on pregnancy leave or to provide health insurance covering 100% of the costs of pregnancy even if other disabled employees did not enjoy these benefits because the failure to provide such benefits has a disparate impact on pregnant workers.

The cases cited by defendants in support of their adverse impact theory are primarily cases in which disparate *treatment* of pregnancy was found to have an adverse impact on female employees and, therefore, was unlawful under Title VII. In other words, pregnancy was singled out for less favorable treatment. *See, e.g., Mitchell v. Board of Trustees,* 599 F.2d 582 (4th Cir. 1979), *cert. denied,* 444 U.S. 965 (1979) (only pregnant workers were required to give advance notice of their inability to commit to a full year's service); *Jacobs v. Martin Sweets Co.,* 550 F.2d 364 (6th Cir. 1977), *cert. denied,* 431 U.S. 917 (1977) (employee terminated because she was pregnant and not married); *Reeves v. Brand-Name Fashion Outlet,* 532 F. Supp. 32 (W.D. Tenn. 1982) (employee demoted during pregnancy).

In *Nashville Gas Co. v. Satty,* 434 U.S. 136, 54 L. Ed. 2d 356, 98 S. Ct. 347 (1977), the Supreme Court found that a leave policy which required an employee who was absent from work on pregnancy leave to forfeit all accumulated job seniority violated Title VII. Employees disabled by other medical conditions were not subject to such forfeiture. The Court distinguished its earlier decision in *General Electric v. Gilbert* on the grounds that seniority forfeiture was a burden on the pregnant employee:

> Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in 'the scheme of human existence,'" . . . But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.

434 U.S. at 142 (emphasis added) (footnote and citation deleted).

Only one case, *Abraham v. Graphic Arts International Union,* 660 F.2d 811 (D.C. Cir. 1981), suggests that a policy which treats employees disabled by pregnancy the same as those disabled by other medical conditions is unlawful under Title VII. There, the employer's sex-neutral disability leave policy which allowed a maximum of ten days of sick leave resulted in the pregnant employee's termination. The D.C. Circuit reversed the summary judgment granted in favor of the employer holding that the employee should be allowed to attempt to prove that the policy had a disparate impact on female employees. Such a result is consistent with the EEOC regulations which provide that a no leave or insufficient leave policy which results in the employee's termination may be unlawful under Title VII if it is shown to have a disparate impact on female employees in a particular case. It does not support defendant's position that, contrary to the EEOC regulations, the failure to guarantee preferential reinstatement rights is *per se* unlawful because such failure has an adverse impact on females in all cases.

III.

DEFENDANTS' ABSOLUTE REQUIREMENT OF REINSTATEMENT REQUIRES DISPARATE TREATMENT OF MALE EMPLOYEES.

A. It Has Not Been Established That The Failure To Guarantee Reinstatement Has An Adverse Impact On Female Employees.

Defendants instruct the Court that it must assume that the Government Code Section 12945(b)(2) was enacted to prevent adverse impact resulting from leave policies which do not guarantee reinstatement. (Defendants' Motion, p. 25). Such an assumption is totally inappropriate. The statute is silent concerning reinstatement and no support is offered for this assertion. As recognized by the EEOC, in separately addressing issues concerning leaves and reinstatement rights in its guidelines, issues concerning the right to take a disability leave and issues concerning the conditions under which reinstatement is available to an employee returning from a disability leave and an employer's obligation to hold a job open are separate issues.

Moreover, even if the State of California had enacted the statute to prevent adverse impact and recognizing that the Commission in its proposed regulations gratuitously states that it seeks to prevent adverse impact on women by requiring guaranteed reinstatement, this in no way establishes that a failure to guarantee reinstatement after a disability leave of up to four months actually has a disparate impact. Simply so stating does not make it so. An employer's policy, for example, under which 95% of male employees returning from a disability leave are reinstated and under which 95% of female employees returning from a disability leave (including pregnancy disability leaves) are reinstated does not have an adverse impact on women. Further, there is no support for the conclusion that guaranteed reinstatement is required after leaves of up to four

months to obviate adverse impact.[4] The general statistics supplied by defendants discussing the rather obvious fact that female workers become pregnant in no way support a determination that failure to *guarantee* reinstatement has an adverse impact.

B. Defendants' Requirement Of Guaranteed Reinstatement Is Absolute And Extends To All Employers Even If No Disparate Impact Exists.

Defendants require California employers to guarantee reinstatement to women returning from pregnancy disability leave in *all* cases (except of course where the employer can meet the extremely rigorous burden of business necessity) without regard to whether an individual employer's policies concerning reinstatement has a disparate impact on females. Thus, even if a disparate impact case could be stated under the PDA concerning reinstatement rights in an individual case (which is not the case, since as established above, the PDA and the EEOC Guidelines require the *same* treatment in this regard), the state law is invalid because it requires reinstatement in all cases regardless of whether an employer's policy has a disparate impact. Indeed, the defendants' "disparate impact" argument is clearly an eleventh-hour attempt to justify an absolute requirement that females disabled by pregnancy be accorded preferential treatment. In *Department of Fair Employment v. Travel Express*, Case No. FEP 80-81, A7-09925, N-18709, 83-17, the Commission held unequivocably that "[e]mployees on temporary disability have a right to return to their same or similar position if the period of pregnancy disability does not exceed four months. Section 12945(b)(2) . . .)."

---

[4] As stated in the House Committee Report, "[t]estimony before the Committee indicates that in 95 percent of the cases, the time lost from work due to pregnancy is six weeks or less . . ." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4753.

The Commision made no inquiry whatsoever and did not even discuss "disparate impact." The same is true of the Commission's decision in *Department of Fair Employment and Housing v. Hyman Goldberg, dba Dyn-Aura Engineering Laboratories*, Case No. FEP 81-82, D8-03725, L-29780, 84-05, wherein the Commission simply stated the absolute rule, citing *Travel Express*. Similarly, in the accusation issued against Cal Fed there is no allegation whatsoever that Cal Fed's reinstatement policy has a disparate impact on females.

C. Sex-Based Classifications Violate Title VII.

If defendants were correct that this absolute requirement does not conflict with Title VII, state laws could be enacted establishing numerous requirements and classifications based on race, sex and other prohibited bases. For example, a state law could be enacted requiring that on *every* written test, Blacks must have their scores increased 25% because in certain individual cases written tests have an adverse impact on Blacks. Such a statute clearly requires discrimination based upon an invidious racial classification.

Defendants' requirements subject employers to sex discrimination lawsuits by male employees in every instance where an employer's state-mandated guaranteed reinstatement policy results in preferential treatment of women as a group over men as a group. It requires employers to discriminate on the basis of sex by giving preferential treatment to women disabled by pregnancy with no possible defense or justification. Defendants, by use of the disparate impact argument, are simply trying to evade the holding of the Ninth Circuit in *Homemakers, Inc. v. Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976). (See Plaintiffs' Motion, pp. 29-30). If the State of California determines that guaranteed reinstatement is required to eliminate a perceived

adverse impact on females, the State is free to enact legislation requiring guaranteed reinstatement of *all* employees returning from a disability leave, male and female; such a law would not conflict with Title VII's prohibition against sex discrimination. As the Ninth Circuit recognized in *Homemakers* it is not the function of the federal courts to "save" state laws which require preferential treatment of females by extending their application to male employees. The state is not free, whatever its motives and whatever adverse impact it may perceive, to require sex discrimination.

Defendants' argument that the State may require preferential treatment of females based upon generalizations concerning women as a group was resoundingly rejected by the Supreme Court in *Arizona Governing Committee v. Norris*, —— U.S. ——, 77 L. Ed. 2d 1236, 103 S. Ct. 3492 (1983). In that case, the State of Arizona argued that it was permissible to utilize sex-based mortality tables to calculate retirement benefits because on the average women live longer than men. The Court stated:

> [P]etitioners incorrectly assume that Title VII permits an employer to classify employees on the basis of sex in predicting their longevity.
>
> • • •
>
> . . . Title VII requires employers to treat their employees as *individuals*, not as "simply components of a racial, religious, sexual, or national class." . . . *Manhart* squarely rejected the notion that, because women as a class live longer than men, an employer may adopt a retirement plan that treats every individual women less favorably than every individual man. . . .

77 L. Ed. 2d at 1248 (citations omitted). The Court concluded:

> The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, *for under the statute "[e]ven a true generalization about [a] class cannot justify class-based treatment."*

77 L. Ed. 2d at 1248 (emphasis added) (citation omitted).

Defendants' requirements that females be extended a benefit to which male employees are not entitled is exactly the type of class-based treatment condemned in *Norris* and demonstrates that the disparate impact argument advanced by the State is an attempt to force a statute requiring discrimination into a mold, disparate impact, in which it does not fit. Disparate impact cases under Title VII deal with the impact of a neutral policy of an individual employer upon that employer's employees. They do not validate state laws establishing classifications based upon sex which conclusively requ[illegible]eferential treatment whether or not disparate im[illegible]exists in an individual case. Further, even if an individual employer's reinstatement policy has a disparate impact, it does not authorize the state to require guaranteed reinstatement of only female employees in all cases. Such a state-imposed requirement to alleviate a disparate impact on females would still result in disparate treatment of male employees and a Title VII violation.

It is clear that defendants' argument that state law is not preempted if any set of facts would sustain the state statute is without merit. (See Defendants' Memorandum, pp. 25-26). Of course, *no* set of facts sustain the state statute; even if an individual Title VII disparate impact case concerning reinstatement could be brought, it is still impermissible to require guaranteed reinstatement only of women disabled by pregnancy. Such a requirement results in disparate treatment of male employees. A federal court in such a case would formulate a remedy to eliminate adverse impact but would *not* require discrimination against male employees. Thus, this Court need not even reach the issue of whether an individual disparate impact case can be brought under the PDA; even were this the case, the State law is not thereby validated. Defendants mistakenly rely on cases where the challenged statute is attacked on equal protection grounds. A classification in a state statute challenged on equal protection grounds is valid if there is any rational basis to sustain it, that is, if any state of facts reasonably may be conceived to justify it. See generally L. Tribe, *American Constitutional Law* 996 (1978). Only one case cited by defendants involves a statute which was challenged on the ground that it was preempted by federal law. In *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945), a state law regulating labor organizations was challenged on the basis that it conflicted with the National Labor Relations Act ("NLRA"). The Court declined to reach the issue, holding instead that it was unable to determine to what extent the challenged sections were valid or invalid under the NLRA because the Court was unable to determine whether the petitioners were subject to the NLRA. Based on the presumption in favor of constitutionality and in the absence of facts demonstrating conflict, the Court declined to hold that the state law was preempted.

The Supreme Court in *Jones v. Rath Packing Co.*, 430 U.S. 519, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977), articulated the standard for determining whether state law is preempted by federal law.

> The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . . This

> inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. . . .

430 U.S. at 526 (citations omitted). As stated in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978):

> "Even if Congress cannot completely foreclose state legislation in a particular area, a *state statute is void to the extent that it actually conflicts with a valid federal statute.*"

435 U.S. at 158 (emphasis added). The state law in this case is void since it requires preferential treatment in all circumstances by establishing an impermissible sex-based classification and thus conflicts *in toto* with Title VII. However, even if this were not the case, it is void to the extent it requires preferential treatment even where disparate impact does not exist.

IV.

TITLE VII DOES NOT SIMPLY REQUIRE THAT WOMEN DISABLED BY PREGNANCY BE PROVIDED WITH NO LESS BENEFITS THAN EMPLOYEES DISABLED BY OTHER MEDICAL CONDITIONS—IT ALSO PROHIBITS DISCRIMINATION IN THEIR FAVOR.

Perhaps because defendants recognize that at its core their disparate impact argument is nothing more than an attempt to justify state-mandated sex discrimination, it is also argued by defendants that "[t]he PDA simply guarantees that pregnant workers are provided with no less disability leave and/or right to reinstatement then is given to male employees." (Defendants' Motion, p. 8). In support of the assertion that it is therefore appropriate under the PDA to accord preferential treatment to females disabled by pregnancy, defendants quote from *Newport News*

Shipbuilding & Dry Dock Company v. EEOC, 462 U.S. ——, 77 L. Ed. 2d 89, 103 S. Ct. 2622, 2632 (1983) that "[t]he 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions *less* favorably than other medical conditions." (Emphasis supplied by defendants) (Defendants' Motion, p. 8).

This argument totally ignores the holding in *Newport News* that the PDA did not abrogate the prohibition against sex discrimination and that male employees had unlawfully been discriminated against on account of their sex by virtue of the fact that female employees were accorded preferential treatment. The PDA does provide that it is unlawful to provide disabled pregnant workers with less benefits than employees disabled by other medical conditions but it also prohibits more favorable treatment of disabled pregnant workers. As stated by the Supreme Court, "[b]y making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee's sex." 77 L. Ed. 2d at 103.

Not only has defendants' argument been rejected by the Supreme Court, it is also contrary to the position of the EEOC, which position was adopted by the Supreme Court. As stated in the Brief For The Equal Employment Opportunity Commission, "[a]lthough Congress clearly intended to require non-discriminatory treatment of women employees, *it certainly did not intend to require discrimination in their favor,* as petitioner's reading of the PDA suggests." (emphasis added) (*BNA's Law Reprints, Labor Law Series*, Volume 16, No. 25, 1982/83 Term, p. 161).

Thus, defendants, argument that the PDA provides only that employees disabled by pregnancy be provided with no less benefits than other disabled employees and that it permits preferential treatment must be rejected out of hand.

V.

A MERE REFERENCE TO A STATE LAW WHICH PROVIDES PREFERENTIAL TREATMENT DOES NOT INDICATE LEGISLATIVE APPROVAL OF THAT LAW.

Defendants' argument that the legislative history of the PDA reflects Congressional approval of state laws which require preferential treatment of female employees disabled by pregnancy has no merit. In a section entitled "State Treatment of Pregnancy," the House Education and Labor Committee Report noted that six states and the District Court of Columbia at that time had fair employment laws which included pregnancy. Significantly, the Report noted in the paragraph preceeding the one in which the six states are listed that:

> The requirement of fringe benefit coverage of workers disabled by pregnancy and related conditions takes two basic forms under state law: (1) a provision for coverage in some form under a state disability insurance law and (2) *a requirement of equal treatment of pregnant workers under a state fair employment practices law.*

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4758.

The intent of the Committee Report in discussing state pregnancy laws was not to either approve or disapprove of any substantive portion of state law. Rather, the Committee Report specifically provided that the significance of the state coverage is two-fold: (1) there is no economic impact on many employers because they are already covered under a state law obligation and (2) employers who operate in several states face different requirements depending on the state.

Four of the six states listed by the Report, in fact, have pregnancy provisions which require equal treatment of

pregnancy-related disabilities. The Maryland state law provision relating to pregnancy was added in 1977 and provides "written and unwritten employment policies and practices involving matters such as commencement and duration of leave . . . reinstatement . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. . ." Maryland Annotated Code, Art. 49B, § 17. Minnesota's Human Rights Act section relating to pregnancy was added in 1977 and defines sex to include "pregnancy, childbirth, and disabilities related to pregnancy or childbirth," and provides that it is an unfair employment practice for an employer "not to treat pregnancy, childbirth, or disabilities related to pregnancy or childbirth, the same as other persons who are not so affected but who are similar on their ability or inability to work." Minnesota Laws, §§ 363.01(29) and 363.03(5).

Alaska's Human Rights Law effective in 1975 specifically prohibited discrimination based on pregnancy. Alaska Statutes § 18.80.220(1). Oregon added a provision to its Fair Employment Practice Act in 1977 to provide that discrimination based on sex includes discrimination because of pregnancy, childbirth and related medical conditions. The law further provides that "[w]omen affected by pregnancy, childbirth or related medical conditions or occurrences shall be treated *the same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ." Oregon Revised Statutes, § 659.029.

Only the Connecticut and Montana laws provide for preferential treatment similar to the California law at issue here. The Montana law was challenged on the ground that it also conflicted with Title VII. The issue was not resolved in that case because the Ninth Circuit determined that the federal court did not have jurisdiction to hear the case.

See Miller-Wohl Co. v. Commissioner of Labor and Industry, 685 F.2d 1088 (9th Cir. 1982).[5]

VI.

REGULATIONS OF FEDERAL AGENCIES APPLICABLE TO RECIPIENTS OF FEDERAL FUNDS AND GOVERNMENT CONTRACTORS DO NOT ALTER THE REQUIREMENTS OF TITLE VII AND THE PDA.

Defendants contend that because the Office of Federal Contract Compliance Programs ("OFCCP") and the Departments of Education and Health and Human Services (the "Departments") have promulgated regulations requiring reinstatement of employees returning from a pregnancy disability leave, preferential treatment of females in this regard is therefore lawful under Title VII. The Departments have authority to issue regulations applicable to educational programs receiving federal funds, and the OFCCP, pursuant to Executive Order 11246, has the authority to issue regulations applicable to federal contractors.

It is clear that the regulations of these agencies are not relevant to consideration of the requirements of Title VII and the PDA. Substantial controversy has long been generated by the regulations and positions taken by OFCCP which conflict with Title VII. For example, the OFCCP has contended that it is not required to follow the Supreme Court decision in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977), holding that a bona fide seniority system does not violate Title VII even if it perpetuates past discrimi-

---

[5] The Ninth Circuit's decision predated the decision of the U.S. Supreme Court in *Franchise Tax Board v. Construction Laborers Vacation Trust,* —— U.S. ——, 77 L. Ed. 420, 103 S. Ct. 2841 (1983), conclusively establishing the jurisdiction of the federal courts to hear cases such as the instant case.

nation. This tension between OFCCP enforcement of the Executive Order and judicial interpretation of Title VII is discussed in B. Schlei and P. Grossman, *Employment Discrimination Law,* "Conflicts Between the Executive Order and Title VII," pp. 915-16 (2d ed. 1983). *See also United States v. East Texas Motor Freight System Inc.,* 564 F.2d 179 (5th Cir. 1977) and *United States v. Truck Management, Inc.,* 662 F.2d 36 (D.C. Cir. 1981). The fact that the OFCCP has issued regulations concerning pregnancy is simply not relevant to consideration of the equal treatment mandate of Title VII.

Similar considerations are applicable to the regulations issued by the Departments. It has never been held that the regulations of the Departments concerning pregnancy are in accord with Title VII. In *North Haven Board of Education v. Bell,* 456 U.S. 512, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982), the Supreme Court simply held that the Department of Education had the authority under Title IX, 20 U.S.C. § 1681 *et seq.,* to issue regulations concerning employment discrimination applicable to federal fund recipients; the recipients contended that the Title IX authority of the Department of Education did not extend to the regulation of employment. The content of the regulations and the provisions concerning pregnancy were not at issue. The Court specifically stated that the challenge to the regulations was directed to "the Department's authority to regulate any employment practices whatsoever." 72 L. Ed. 2d at 320. The Court noted that the record "does not reflect whether petitioners' employment practices actually discriminated on the basis of gender or whether any such discrimination comes within the prohibition of Title IX." 72 L. Ed. 2d at 319-20. *North Haven* simply does not support defendants' arguments. In fact, the employment regulations at issue were adopted in 1975, three years *before* the enactment of the PDA (see the discussion in *North Haven* at 456 U.S. 512, 515-16) and remained in effect following the decision of the Supreme Court in *General Elec-*

tric Co. v. Gilbert, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976), that pregnancy discrimination was not sex discrimination. Thus, the regulations conflicted with the requirements of Title VII for several years; to the extent that they require preferential treatment and discrimination against males on the basis of sex, they still conflict and no court has held to the contrary.

Defendants assert that it is unreasonable that a government contractor could be debarred by the OFCCP and that an educational institution can lose funding under Title IX for failure to comply with regulations while at the same time an employee cannot sue under Title VII claiming an entitlement to preferential treatment. While defendants may feel this is unreasonable, the fact remains that the agencies in questions do not. As noted above, the OFCCP in particular has historically maintained that it has the authority to regulate and impose obligations beyond those applicable under Title VII. *See, e.g., Crown Zellerbach Corp. v. Marshall,* 441 F. Supp. 1110 (E.D. La. 1977) (holding that the provisions of Title VII are not applicable to the Executive Order).

VII.

CONCLUSION

Despite defendants' attempts to justify the state law at issue here on an adverse impact theory, the simple fact remains that Government Code Section 12945(b)(2) requires California employers to discriminate based on sex. Defendants ignore the discrimination against males which results from according preferential treatment to pregnant females and instead retreat to sexual stereotypes and classifications of groups by sex which have been rejected by the United States Supreme Court in interpreting Title VII.

The mandate of Title VII and the PDA is clear—employers must treat women affected by pregnancy-related disabilities the same as employees disabled by other medical conditions. To the extent that the state law requires preferential treatment for pregnant employees, it conflicts with Title VII because it "stands as an obstacle" to the purpose of Title VII and because plaintiffs herein cannot comply with both state and federal law.

The issues are clear cut and the facts are not in dispute. This Court should, therefore, deny defendants' motion for summary judgment and grant plaintiffs' motion for summary judgment. Defendants must be enjoined from enforcing a state law which is preempted by Title VII and void under the Supremacy Clause.

DATED: March 5, 1984

GIBSON, DUNN & CRUTCHER
JEROME C. BYRNE
WILLARD Z. CARR, JR.
PAMELA L. HEMMINGER
JAN E. EAKINS

By /s/ PAMELA L. HEMMINGER
Pamela L. Hemminger

Attorneys for Plaintiffs
California Federal Savings and
Loan Association, Merchants and
Manufacturers Association, and
California Chamber of Commerce

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2109

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: March 19, 1984
Time: 10:00 a.m.
Courtroom: 14

TOPICAL INDEX

Pages

I. INTRODUCTION JA-135

II. STANDARD OF REVIEW JA-136

III. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF DEMONSTRATING THAT THEY ARE ENTITLED TO SUMMARY JUDGMENT JA-137

A. Plaintiffs Have Not Established That They Are In Compliance With Title VII JA-137

B. Plaintiffs Have Not Established That the State Statute is Preempted By Federal Law JA-139

C. Plaintiffs Have Failed to Exhaust Administrative Remedies So This Matter is Not Ripe For Adjudication By This Court JA-147

CONCLUSION JA-151

TABLE OF AUTHORITIES

Cases *Pages*

Federal

Abbott Laboratories v. Gardner (1967) 387 U.S. 136 .....JA-148

Abraham v. Graphic Arts Intern. Union (D.C. Cir. 1981) 660 F.2d 811 .....JA-140,144, 147

Adickes v. S.H. Kress & Co. (1970) 398 U.S. 144 ..JA-136, 138

Alabama Public Service Comm. v. Southern R. Co. (1951) 341 U.S. 341 .....JA-150

Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36 .....JA-140

Bakersfield City Sch. Dist. of Kern Cty. v. Boyer (9th Cir. 1979) 610 F.2d 621 .....JA-148

Beckham v. Safeco Inc. Co. of America (9th Cir. 1982) 691 F.2d 898 .....JA-138

Bricklayers, Etc., U. 15, Fla. v. Stuart Plaster Co., Inc. (5th Cir. 1975) 512 F.2d 1017 .....JA-139

Burns v. Rohr Corporation (S.D.Cal. 1972) 346 F. Supp. 994 .....JA-146, 147

Capitol Industries - EMI, Inc. v. Bennett (9th Cir. 1982) 681 F.2d 1107, cert. den. (1982) —— U.S. ——, 103 S.Ct. 570 .....JA-150

Dash, Inc. v. Alcoholic Beverage Control Appeals Bd. (9th Cir. 1982) 683 F.2d 1229 .....JA-150

Dawn v. Sterling Drug, Inc. (C.D. Cal. 1970) 319 F.Supp. 358 .....JA-136

De Canas v. Bica (1976) 424 U.S. 351 .....JA-141, 150

Dosier v. Miami Valley Broadcasting Corp. (9th Cir. 1981) 656 F.2d 1295 .....JA-136

TABLE OF AUTHORITIES—contd.

Cases *Pages*

Federal

Florida Avocado Growers v. Paul (1963) 373 U.S. 132 .....JA-142

Fullilove v. Klutznick (1980) 448 U.S. 448 ....JA-145, 146

Gee v. Tenneco, Inc. (9th Cir. 1980) 615 F.2d 857 ..JA-136, 139

General Electric Co. v. Gilbert (1976) 429 U.S. 125.JA-141

Griggs v. Duke Power Co. (1971) 401 U.S. 424..JA-138, 143

Hines v. Davidowitz (1940) 312 U.S. 52 .....JA-144

Homemakers, Inc. of L.A. v. Division of Indus. Welf. (9th Cir. 1974) 509 F.2d 20 .....JA-146, 147

Hutchinson v. United States (9th Cir. 1982) 677 F.2d 1322 .....JA-136

In re Data General Corp. Antitrust Litigation (N.D. Cal. 1980) 490 F.Supp. 1089 .....JA-139

Johnson v. Railway Express Agency (1975) 421 U.S. 454 .....JA-140

Los Angeles Dept. of Water & Power v. Manhart (1978) 435 U.S. 702 .....JA-147

McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792 .....JA-140

McKart v. United States (1969) 395 U.S. 185 .....JA-148

New York Dept. of Social Services v. Dublino (1973) 413 U.S. 405 .....JA-142

Newport News Shipbuilding & Dry Dock Co. v. v. EEOC (1983) —— U.S. ——, 103 S.Ct. 2622 ..JA-144, 145

Pac. Gas & Elec. v. St. Energy Resources Conserv. (1983) —— U.S. ——, 103 S.Ct. 1713 ....JA-148, 149

TABLE OF AUTHORITIES—contd.

Cases *Pages*

Federal

Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc. (9th Cir. 1977) 563 F.2d 391 ..... JA-137

Ray v. Atlantic Richfield Co. (1978) 435 U.S. 151 .. JA-139, 141

Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218 ..... JA-141

Rogers v. Peabody Coal Co. (6th Cir. 1965) 342 F. 2d 749 ..... JA-136

Rosenfeld v. Southern Pacific Co. (9th Cir. 1971) 444 F.2d 1219 ..... JA-147

Savage v. Jones (1912) 225 U.S. 501 ..... JA-144

Schwartz v. Texas (1952) 344 U.S. 199 ..... JA-142

Shaw v. Delta Airlines, Inc. (1983) —— U.S. ——, 103 S.Ct. 2890 ..... JA-141

Sherman v. British Leyland Motors, Ltd. (9th Cir. 1979) 601 F.2d 429 ..... JA-136

Teamsters v. United States (1977) 431 U.S. 324 ... JA-138

U.S. v. State of Cal., State Water Resources (9th Cir. 1982) 694 F.2d 1171 ..... JA-141, 148

United States v. First Nat. Bank of Circle (9th Cir. 1981) 652 F.2d 882 ..... JA-138

United States v. Fred A. Arnold, Inc. (9th Cir. 1978) 573 F.2d 605 ..... JA-136

State

Fenske v. Public Emp. Retirement System (1980) 103 Cal.App.3d 590 ..... JA-150

H. W. Rohl Co. v. County of San Diego (1963) 212 Cal.App.2d 707 ..... JA-149

TABLE OF AUTHORITIES—contd.

Statutes *Pages*

Cal. Gov. Code, § 12945 ..... JA-135

42 U.S.C. § 2000 ..... JA-135, 141

Books

6 *Moore's Federal Practice*, ¶ 56.15[3], p. 463 ..... JA-136

6 *Moore's Federal Practice*, ¶ 56.15[3], p. 476 ..... JA-137

EEOC Compliance Manual, § 626.4, "Right to Work," reprinted in EEOC Compliance Manual (CCH) ¶ 4804 ..... JA-143

EEOC Compliance Manual, § 626.5, "Maternity Leave," reprinted in EEOC Compliance Manual (CCH) ¶ 4805 ..... JA-143

Wright, Miller & Kane, *Federal Practice and Procedure, Civil* 2d § 2725, p. 125 ..... JA-137

Federal Regulations

29 C.F.R. § 1604.10(b) JA-143

29 C.F.R. § 1604.10(c) JA-143

29 C.F.R. 1604 [Appendix, Question and Answer No. 9] JA-143

Rule 56(c), Fed. R. Civ. Proc. JA-136

Rule 7.14.3, Local Rules of Central District of California JA-136

State Regulation (Proposed)

Proposed Regulation §§ 7291.2(b)(7) and (c)(2)(B) JA-149

Miscellaneous

H.R. Rep. No. 95-948, 2d Sess., pp. 2-3 (1978), reprinted in (1978) U.S. Code Cong. & Admin. News, pp. 4749, 4750-4751 ..... JA-141

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2109

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: March 19, 1984
Time: 10:00 a.m.
Courtroom: 14

I

INTRODUCTION

This Memorandum responds to a Motion For Summary Judgment filed by plaintiffs California Federal Savings and Loan Association ("Cal Fed"), Merchants and Manufacturers Association ("M & M") and the California Chamber of Commerce ("the Chamber") ("Plaintiffs' Motion") Plaintiffs claim that they are entitled, through summary judgment, to a declaration that California Government Code section 12945(b)(2) ("the state statute") and the enforcement policies of the California Fair Employment and Housing Commission ("the Commission") and the California Department of Fair Employment and Housing ("the Department") respecting the state statute, are preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended ("Title VII"). Plaintiffs also seek to permanently enjoin defendants from enforcing the state statute. Plaintiffs maintain that since the state statute and defendants' interpretation thereof require employers to extend preferential treatment to pregnant employees with respect to pregnancy leave and reinstatement they are in conflict with and are therefore preempted by Title VII.

Defendants' motion for summary judgment ("Defendants' Motion") filed with the Court on February 15, 1984, comprehensively sets forth defendants' position that neither the state statute nor defendants' interpretation thereof are preempted by federal law since they are consistent with and not in conflict with Title VII. Several arguments set forth in Defendants' Motion are summarized briefly in this Response. (See Arg. III (B), *infra.*) However, rather than reiterate that discussion in detail in this Response, defendants respectfully refer this Court to Defendants' Motion on file in this action.

For the reasons set forth below, this Court should deny plaintiffs' motion for summary judgment since genuine

issues of material fact necessary to plaintiffs' claims exist and plaintiffs have not demonstrated that they are entitled to summary judgment as a matter of law.

II

STANDARD OF REVIEW

Summary judgment must be denied unless the moving party meets its burden of establishing that: (1) no genuine issue as to any material fact exists; (2) the motion is supported by a completely adequate record for the legal decision; and (3) based on those undisputed material facts, the substantive legal principles warrant a judgment for the moving party. (Rule 56(c), Fed. R. Civ. Proc.; see also *Hutchinson* v. *United States* (9th Cir. 1982) 677 F.2d 1322, 1325.) The moving party has the burden of clearly establishing each of these elements. (6 *Moore's Federal Practice,* ¶ 56.15[3] at 463 *et seq; Dosier* v. *Miami Valley Broadcasting Corp.* (9th Cir. 1981) 656 F.2d 1295, 1300.)

The federal courts have held that summary judgment should be granted sparingly and reluctantly because it is a drastic measure depriving the losing party of a trial on the merits. (*Rogers* v. *Peabody Coal Co.* (6th Cir. 1965) 342 F.2d 749, 751; *Dawn* v. *Sterling Drug, Inc.* (C.D. Cal. 1970) 319 F.Supp. 358, 361.) If there is a genuine issue as to any material fact, summary judgment must be denied. (*United States* v. *Fred A. Arnold, Inc.* (9th Cir. 1978) 573 F.2d 605, 606.) Where the material submitted by the moving party is insufficient or demonstrates on its face genuine issues as to material facts, the non-moving party need not file any affidavits or other supporting material. (*Gee* v. *Tenneco, Inc.* (9th Cir. 1980) 615 F.2d 857, 859; see also *Adickes* v. *S.H. Kress & Co.* (1970) 398 U.S. 144, 153-161; *Sherman* v. *British Leyland Motors, Ltd.* (9th Cir. 1979) 601 F.2d 429, 439; Rule 7.14.3, Local Rules of Central District of California [Material facts claimed by the moving party not to be in controversy must be "adequately supported."]; 6 *Moore's Federal Practice,* ¶ 56.15[3] at 476.)

In determining the "facts" upon which a summary judgment is based, the party opposing summary judgment is entitled to the benefit of all reasonable doubts and inferences in determining the existence of a genuine issue. Wright, Miller & Kane, *Federal Practice and Procedure, Civil* 2d § 2725 at 125; *Pepper & Tanner, Inc.* v. *Shamrock Broadcasting, Inc.* (9th Cir. 1977) 563 F.2d 391, 393.)

III

PLAINTIFFS HAVE NOT MET THEIR BURDEN OF DEMONSTRATING THAT THEY ARE ENTITLED TO SUMMARY JUDGMENT

A. Plaintiffs Have Not Established That They Are In Compliance With Title VII

Plaintiffs claim that Cal Fed has a pregnancy/childbirth leave of absence program that complies with federal law in that it treats female employees disabled by pregnancy the same as employees temporarily disabled by other medical conditions. (Plaintiffs' Motion, p. 7; see also Complaint ¶ 13.) Plaintiffs additionally assert that the pregnancy/childbirth leave of absence policies of members of M & M and the Chamber [1] similarly comply with federal law. (See Plaintiffs' Motion, p. 7; see also Complaint ¶ 22.)[2] While

---

[1] For ease of reference, the disability leave of absence policies of the members of M & M and the Chamber will hereinafter be referred to as the disability leave of absence policies of "Plaintiffs."

[2] Although the parties' have stipulated that M & M and the Chamber have members with disability policies with provisions similar in certain respects to those found in Cal Fed's leave of absence policy (see Stipulated Findings of Fact No. 8), the parties have not stipulated that these policies or any one or more of them comply with Title VII. Defendants have denied this allegation (see Defendants' Answer To Complaint For Declaratory and Injunctive Relief, ¶ 13.)

plaintiffs make this general unsupported assertion, they have not demonstrated that their pregnancy/childbirth disability leave of absence policies do in fact comply with Title VII. Therefore, a genuine issue of disputed material fact remains which precludes plaintiffs from obtaining summary judgment in this matter. (*Beckham* v. *Safeco Inc. Co. of America* (9th Cir. 1982) 691 F.2d 898, 902-903; *United States* v. *First Nat. Bank of Circle* (9th Cir. 1981) 652 F.2d 882, 887.)

It is not sufficient for purposes of establishing Title VII compliance that plaintiffs' disability leave of absence policies might, as written, call for the treatment of female employees disabled by pregnancy, childbirth or related medical conditions in the same manner as employees disabled by other medical conditions. (See Stipulated Findings of Fact Nos. 7 and 8.) It is clear that Title VII may be violated when an employer intentionally applies its policies unequally to the detriment of employees of one sex (*Teamsters* v. *United States* (1977) 431 U.S. 324) *and* when an employer evenly applies facially neutral policies which have an adverse impact upon employees of one sex (*Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424). Therefore, while plaintiffs' disability leave of absence policies may appear facially neutral, they may nevertheless violate Title VII in the manner which they are actually applied.

As the moving parties, plaintiffs have the burden of showing the absence of a genuine issue as to any material fact and their motion must be viewed in the light most favorable to defendants. (*Adickes* v. *Kress & Co., supra,* 398 U.S. 144, 157.) Plaintiffs have not carried this burden because they have failed to establish compliance with Title VII.

Moreover, the question of plaintiffs' compliance with Title VII is clearly a disputed issue of material fact relevant to plaintiffs' being able to prevail on their claims. "A material fact is one which, under applicable principles

of substantive law, must exist in order to support a judgment in favor of the moving party." (*In re Data General Corp. Antitrust Litigation* (N.D. Cal. 1980) 490 F.Supp. 1089, 1102.) Plaintiffs claim that since their disability leave of absence policies are in compliance with Title VII they are not required to comply with what they assert is conflicting state law. Defendants maintain that the state statute is not in conflict with Title VII in that compliance with the state statute avoids violating federal law. Therefore, resolution of the issue of whether plaintiffs are in fact in compliance with Title VII is necessary to support a judgment for plaintiffs.[3]

Where the material submitted by the moving party in support of its summary judgment motion is insufficient or demonstrates on its face genuine issues of fact, as in this case, the non-moving party need not file any affidavits or other supporting material. (*Gee* v. *Tenneco, Inc., supra,* 615 F.2d 857, 859, and cases cited therein.) Since issues of fact material to plaintiffs' case remain in dispute, plaintiffs are not entitled to summary judgment.

B. Plaintiffs Have Not Established That the State Statute is Preempted By Federal Law

Plaintiffs allege that under the preemption standard enunciated in *Ray* v. *Atlantic Richfield Co.* (1978) 435 U.S. 151, 158, the state statute and defendants' enforcement policies conflict with and are therefore preempted by fed-

---

[3] While the factual issue of plaintiffs' compliance with Title VII is material to plaintiffs' summary judgment motion, it is not a genuine issue of fact material to defendants' motion for summary judgment. Whether plaintiffs comply with Title VII is irrelevant to defendants' position that the state statute is not preempted by federal law. (See e.g., Defendants' Motion, p. 24.) (See *Bricklayers, Etc., U. 15, Fla.* v. *Stuart Plaster Co., Inc.* (5th Cir. 1975) 512 F.2d 1017, 1023.)

eral law since compliance with both the state statute and Title VII is a physical impossibility and the state statute stands as an obstacle to the accomplishment of the purposes and objectives of Title VII. (Plaintiffs' Motion, pp. 16, 18.) Contrary to plaintiffs' assertion, the state statute is not preempted by Title VII since it is fully consistent with the goals and objectives of Title VII and compliance with both Title VII and the state statute is not, as plaintiffs suggest, a physical impossibility.

As has been set forth in detail in Defendants' Motion at pages 22, et seq., the state statute assures equality of employment opportunities for women by protecting female employees affected by pregnancy, childbirth and related medical conditions from adverse impact resulting from employment policies which provide insufficient disability leave. This protection is meaningless unless women who take disability leave on account of pregnancy, childbirth or related medical conditions have the right to return to the same or similar job within a reasonable period of time. As such, the state statute and defendants' interpretation thereof are consistent with the equal employment goals and objectives of Title VII since they reflect a recognition that insufficient or no-leave policies and/or policies which fail to provide reinstatement have an adverse impact on childbearing women and therefore may constitute sex discrimination under Title VII. (See e.g., *Abraham* v. *Graphic Arts Intern. Union* (D.C. Cir. 1981) 660 F.2d 811.) As the Supreme Court has often noted, "Congress enacted Title VII of the Civil Rights Act of 1964 . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." (*Alexander* v. *Gardner-Denver Co.* (1974) 415 U.S. 36, 44, citing *McDonnell Douglas Corp.* v. *Green* (1973) 411 U.S. 792, 800; *Johnson* v. *Railway Express Agency* (1975) 421 U.S. 454, 457.)

Since the general purpose of Title VII is to eliminate discrimination in employment, it is consistent with the

goals and objectives of the federal legislation for a state to enact a statute which recognizes that failure to provide childbearing workers with reasonable disability leave and/or reinstatement constitutes unlawful adverse impact discrimination. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." (*De Canas* v. *Bica* (1976) 424 U.S. 351, 356.) State statutes are not in conflict with Title VII simply because they provide additional protection for workers. (*Shaw* v. *Delta Airlines, Inc.* (1983) —— U.S. ——, 103 S.Ct. 2890, 2903.)

Plaintiffs' assertion that the state statute is preempted by federal law since it is inconsistent with the purpose of Congress in enacting the Pregnancy Discrimination Amendment ("PDA") to Title VII, 42 U.S.C. § 2000e(k), is not well founded. When a state's exercise of its police power is challenged under the Supremacy Clause, as in the case at bar, the court begins with the assumption that the historic police powers of the states are not to be preempted unless that was " 'the clear and manifest purpose of Congress.' " (*Ray* v. *Atlantic Richfield Co., supra,* 435 U.S. 151, 157, quoting from *Rice* v. *Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230; see also *U.S.* v. *State of Cal., State Water Resources* (9th Cir. 1982) 694 F.2d 1171, 1176.) As noted in Defendants' Motion at pages 32-33, the PDA was enacted in response to the decision in *General Electric Co.* v. *Gilbert* (1976) 429 U.S. 125, wherein the Court held that an employer's disability benefits plan which excluded pregnancy-related disabilities did not discriminate on the basis of sex within the meaning of Title VII. The PDA was enacted simply to amend Title VII to clarify Congress' intent that pregnancy discrimination was sex discrimination and that pregnant workers be treated no *less* favorably than other workers. (H.R. Rep. No. 95-948, 2d Sess. pp. 2-3 (1978), reprinted in (1978) U.S. Code Cong. & Admin. News pp. 4749, 4750-4751.)

However, while the legislative history of the PDA reflects Congress' intent that women affected by pregnancy, childbirth or related medical conditions not receive less favorable treatment than similarly situated coworkers, plaintiffs have pointed to nothing in the legislative history which supports their assertion that in enacting the PDA it was Congress' intent to foreclose state legislation which provides pregnant workers with additional protection in order to ensure equality of employment opportunity.[4] Moreover, as set forth more fully in Defendants' Motion at pages 34-36, it is clear from the legislative history of the PDA that the state statute was the type of state legislation of which Congress was aware and which it approved when the PDA was passed.

> "[F]ederal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." (*Florida Avocado Growers* v. *Paul* (1963) 373 U.S. 132, 142.)

---

[4] Plaintiffs rely on several excerpts from the House Committee Report on the PDA and certain remarks of Senator Williams in opposition to an amendment to limit pregnancy benefits (Plaintiffs' Motion, p. 23-26) as reflecting congressional intent to preempt the type of state statute at issue here. While these excerpts reflect congressional reaction to the *Gilbert* decision and concern that childbearing workers not be treated less favorably than other workers, they cannot be read to imply congressional intent to preempt a state law which seeks to prevent adverse impact discrimination. "Far more would be required to show the 'clear manifestation of [congressional] intention' which must exist before a federal statute is held 'to supersede the exercise' of state action." (*New York Dept. of Social Services* v. *Dublino* (1973) 413 U.S. 405, 417, quoting from *Schwartz* v. *Texas* (1952) 344 U.S. 199, 202-203.)

Plaintiffs have not demonstrated that in enacting the PDA, Congress intended to invalidate either the adverse impact theory as developed by *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424, in the area of pregnancy discrimination, or state laws such as the state statute in issue here.

In support of their assertion that the state statute is inconsistent with Title VII, plaintiffs rely on certain interpretations of the PDA propounded by the Equal Employment Opportunity Commission ("EEOC") and set forth in its Guidelines on Discrimination Because of Sex (see 29 C.F.R. § 1604.10(b)), its "Questions and Answers on the Pregnancy Discrimination Act" (see 29 C.F.R. § 1604 [Appendix, Question and Answer No. 91]), and the EEOC Compliance Manual (see § 626.4, "Right to Work," reprinted in EEOC Compliance Manual (CCH) ¶ 4804)). (See Plaintiffs' Motion, pp. 20-23.) While these references reflect the EEOC's interpretation of the PDA that disabilities caused by pregnancy not be treated less favorably than other disabilities, nothing in these references suggests that the EEOC would consider the state statute in issue here to be in conflict with Title VII. Moreover, it is clear that facially neutral employment policies having an adverse impact on pregnant employees would be found by the EEOC to violate Title VII. In the section of the EEOC Compliance Manual entitled "Maternity Leave," the EEOC expressly finds that:

> ". . . even a facially neutral [disability leave] policy (for example, denying *any* disability leave unless an employee has been employed for a set period of time or has tenure) may be unlawful where it adversely affects female employees and is not justified by overriding business necessity." (§ 626.5, "Maternity Leave," reprinted in EEOC Compliance Manual (CCH) ¶ 4805; see also EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10(c).)

Nor is compliance with both the state law and Title VII a physical impossibility as plaintiffs claim. Plaintiffs maintain that if California employers comply with the state statute, they will violate the PDA which mandates that pregnant females be reinstated to their positions on the same basis as employees returning from other disability leaves. (Plaintiffs' Motion, p. 28.) However, plaintiffs' literal construction of the PDA would effectively abolish the Title VII adverse impact theory as applied to sex discrimination cases involving pregnancy. (See e.g., *Abraham* v. *Graphic Arts Intern. Union, supra,* 660 F.2d 811.) As the Court noted in *Hines* v. *Davidowitz* (1940) 312 U.S. 52, in discussing the issue of federal preemption of state law, " '[w]hen the question is whether a Federal act overrides a state law, the *entire scheme* of the (federal) statute must of course be considered and that which needs must be implied is of no less force than that which is expressed.' " (*Id.*, at p. 67 n. 20, quoting from *Savage* v. *Jones* (1912) 225 U.S. 501, 533; emphasis added.) Once the PDA is properly construed in light of its purpose, the impetus for its enactment and the entire Title VII statutory scheme, it is clear that there is no conflict between state and federal law requiring preemption in this case. By complying with the state statute, employers in California avoid the adverse impact prohibition of federal law.

Plaintiffs' reliance upon *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC* (1983) —— U.S. ——, 103 S.Ct. 2622, in support of their assertion that by complying with the state statute they will engage in unlawful discrimination against male employees is also not well-taken. In *Newport News,* the Court held that an employer's health insurance plan which provided female employees with hospitalization benefits for pregnancy-related conditions but which provided less extensive pregnancy benefits for spouses of male employees constituted a Title VII violation since it had the effect of discriminating against the

male employees. However, the Court noted that differential treatment on the basis of sex does not constitute unlawful discrimination under Title VII when exempted by an affirmative justification. (103 S.Ct. 2622, 2631 n. 23.) Since the state statute in issue here protects childbearing workers from the adverse impact on the basis of sex associated with facially neutral employment policies providing inadequate leave and/or no reinstatement rights, it is consistent with the equal employment objectives of Title VII and therefore fully justified. In complying with the state statute, California employers are not subjecting themselves to Title VII liability by male employees.

Nor is the threat of reverse discrimination suits by male employees sufficient to invalidate the state statute. *Fullilove* v. *Klutznick* (1980) 448 U.S. 448, is instructive in this regard. In that case, the Court was faced with a constitutional challenge by non-minority businesses to the Minority Business Enterprise ("MBE") provisions of the Public Works Employment Act of 1977 requiring that at least ten percent of federal funds granted for local public works projects be used to procure services or supplies from minority group businesses. The Court found that the MBE provision was constitutional after taking judicial notice of the fact that "Congress had abundant historical bases from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." (*Id.*, at p. 478.) The Court noted that the inability of non-minority firms to receive certain contracts as a result of MBE was simply an "incidental consequence" of the program and not part of its objective (*Id.*, at p. 484).

Similarly, in the case at bar, this Court can take judicial notice of the fact that since only women become pregnant, an inadequate leave policy or a policy which fails to accommodate reinstatement will have an adverse impact on childbearing workers. (See Defendants' Motion, pp. 20-21.)

The fact that disabled male employees or female employees disabled by non-pregnancy-related conditions may not receive the same disability benefits which the state statute requires for women disabled by pregnancy, childbirth or related medical conditions is simply an "incidental consequence" of a law designed to provide childbearing workers with equality of opportunity in the workplace. "It is not a constitutional defect in this [state statute] that it may disappoint the expectations of [similarly situated disabled coworkers]." (*Fullilove* v. *Klutznick, supra,* at p. 484.)

In further support of their argument that the state statute is preempted by Title VII, plaintiffs cite to two cases which invalidated certain California State protective legislation. In *Homemakers, Inc. of L.A.* v. *Division of Indus. Welf.* (9th Cir. 1974) 509 F.2d 20, cert. den. (1976) 423 U.S. 163, the court affirmed a lower court decision invalidating provisions of the California Labor Code requiring employers to pay overtime to female employees, a benefit not extended to male employees. In *Burns* v. *Rohr Corporation* (S.D.Cal. 1972) 346 F.Supp. 994, the court held that a state labor regulation requiring employers to provide female, but not male, employees with rest periods conflicted with and was therefore preempted by Title VII. Plaintiffs rely upon these two cases for the proposition that state laws requiring preferential treatment for women are to be preempted and not justified by an extension of their coverage to accommodate male employees. (Plaintiffs' Motion, pp. 28-31.)

Plaintiffs' reliance upon these cases is misplaced, however, since the state statute cannot be viewed as analogous to the protective legislation invalidated in those cases. Underlying the decisions in *Homemakers* and *Burns* is the assumption that state protective legislation is in conflict with Title VII when its sex-differential treatment is based upon stereotypic assumptions about the sexes or normative differences between the sexes, resulting in classifications

which are either under or over-inclusive. (See e.g., *Rosenfeld* v. *Southern Pacific Co.* (9th Cir. 1971) 444 F.2d 1219, where the court struck down sex-based weight-lifting limitations.) "It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." (*Los Angeles Dept. of Water & Power* v. *Manhart* (1978) 435 U.S. 702, 707.)

The state statute in issue here is not based upon stereotyped assumptions concerning gender differences and it is neither under nor over-inclusive. No man will ever require disability leave for pregnancy so the state statute is not under-inclusive, and pregnant women who choose not to go on pregnancy leave are not forced to, so the statute is not over-inclusive. Moreover, the state statute does not constitute protective legislation or mandate "preferential" treatment as exemplified by the statutes struck down in *Homemakers* and *Burns*. The state statute reflects an attempt to provide childbearing workers with equal opportunity to compete in the workplace by minimizing the risk of job layoffs and terminations which would be the inevitable result of insufficient leave policies or policies which fail to provide for reinstatement. (See *Abraham* v. *Graphic Arts Intern. Union, supra,* 660 F.2d 811, 819.)

Because plaintiffs have failed to demonstrate that the state statute is in conflict with and therefore preempted by federal law, they have not established that they are entitled to summary judgment as a matter of law.

C. Plaintiffs Have Failed to Exhaust Administrative Remedies So This Matter is Not Ripe For Adjudication By This Court

Because neither the Commission nor the California courts have had occasion to rule on the question of whether Cal Fed's pregnancy disability leave of absence policy complies with state law, plaintiffs' challenge to the state

statute and defendants' enforcement policies is not ripe for judicial review by this Court. Plaintiffs should be required to exhaust their administrative remedies prior to seeking relief in this Court. Therefore, plaintiffs' motion for summary judgment should be denied since they have failed to state a claim upon which relief can be granted.

The basic rationale of the ripeness doctrine, as set forth in *Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136:

> "[i]s to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (*Id.*, at pp. 148-149.)

(See also *Pac. Gas & Elec.* v. *St. Energy Resources Conserv.* (1983) —— U.S. ——, 103 S.Ct. 1713, 1720; *U.S.* v. *State of Cal., State Water Resources, supra*, 694 F.2d 1171, 1181.) The doctrine of exhaustion of administrative remedies precludes entitlement to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. (*McKart* v. *United States* (1969) 395 U.S. 185, 193; *Bakersfield City Sch. Dist. of Kern Cty.* v. *Boyer* (9th Cir. 1979) 610 F.2d 621, 626.)

Because an administrative hearing has yet to be held in the matter involving Cal Fed employee Lillian Garland ("Garland"), no administrative finding has been made with respect to whether Cal Fed has even violated the state statute in the manner in which it reinstated Garland to employment following her pregnancy disability leave. There are several factual issues which must be resolved in the first instance by the administrative agency prior to a determination as to whether state law has been violated. The Commission must decide *inter alia* whether, under the facts of the case, Cal Fed's failure to return Garland to

her original job was justified by business necessity and whether Cal Fed made reasonable, good faith efforts to return Garland to a substantially similar job within a reasonable period of time. (See Proposed Regulation §§ 7291.2(b)(7) and (c)(2)(B), attached as Exhibit A to Stipulated Findings of Fact, pp. 2-3, 5). The Commission's prime focus would be whether Cal Fed acted reasonably in the way in which it reinstated Garland following her pregnancy/childbirth disability leave and whether the facts of the case satisfy the business necessity defense. Cal Fed's preemption challenge is premature since these factual issues have not been resolved. (See *Pac. Gas & Elec.* v. *St. Energy Resources Conserv., supra*, 103 S.Ct. 1713, 1721, where the Court found premature a preemption challenge to a state law which preconditioned the building of nuclear plants on a finding of adequate capacity for storage of the plant's spent fuel rods, the Court noting that without final agency action it could not be known whether the agency would ever find a nuclear plant's storage capacity to be inadequate.)

Furthermore, state court review of an agency decision by means of a petition for writ of mandate is part of the administrative process which must be exhausted before plaintiffs may pursue the instant action. As described in *H. W. Rohl Co.* v. *County of San Diego* (1963) 212 Cal. App.2d 707, 711 [28 Cal. Rptr. 196], where a plaintiff sought to attack a use permit denial both by a petition for writ of mandate and a complaint for declaratory and injunctive relief which alleged that the underlying ordinance was invalid:

> "[T]he correct rule is that the petition for a writ of mandate for the purpose of reviewing the action of the administrative body should first be brought to a conclusion. Thereafter the property owner, having exhausted his administrative remedies, is at liberty to pursue his individual remedy, by way of determining

the validity of the ordinance in question insofar as it affects his property.''

(See also *Alabama Public Service Comm.* v. *Southern R. Co.* (1951) 341 U.S. 341, 348-350.)

If plaintiffs' claims have any merit, there is no question but that the California courts may grant plaintiffs appropriate relief pursuant to a petition seeking review of the Commission's decision (*Dash, Inc.* v. *Alcoholic Beverage Control Appeals Bd.* (9th Cir. 1982) 683 F.2d 1229, 1234; *Capitol Industries - EMI, Inc.* v. *Bennett* (9th Cir. 1982) 681 F.2d 1107, 1117-1118, cert. den. (1982) —— U.S. ——, 103 S.Ct. 570 and 1189]; and *Fenske* v. *Public Emp. Retirement System* (1980) 103 Cal.App.3d 590, 595 [163 Cal. Rptr. 182].)

Neither the state statute nor defendants' enforcement policies have been reviewed by the California courts. Accordingly, there are questions of construction of the state statute to be settled by the state courts before a determination is appropriate whether, as construed, the state statute is preempted by federal law. (See *De Canas* v. *Bica, supra,* 424 U.S. 351, 363-363.) Because plaintiffs have filed the instant action before exhausting administrative remedies, including review in the state courts by way of petition for writ of mandate, this action is premature and plaintiffs' motion for summary judgment should accordingly be denied.

CONCLUSION

For the reasons stated above, defendants respectfully request that this Court deny Plaintiffs' Motion for Summary Judgment under Rule 56(c).

DATED: MARCH 5, 1984.

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General

By /s/ MARC E. TURCHIN
Marc E. Turchin
Deputy Attorney General

Attorneys for Defendants

GIBSON, DUNN & CRUTCHER
JEROME C. BYRNE
WILLARD Z. CARR, JR.
PAMELA L. HEMMINGER
JAN E. EAKINS
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Plaintiffs
California Federal Savings and
Loan Association, Merchants
and Manufacturers Association
and California Chamber of
Commerce

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hearing

Date: March 19, 1984
Time: 10:00 a.m.
Place: Courtroom 14

TABLE OF CONTENTS

Page

I PLAINTIFFS' COMPLIANCE WITH TITLE VII IS NOT RELEVANT TO THE DETERMINATION OF WHETHER STATE LAW CONFLICTS WITH TITLE VII JA-156

II A STATE LAW WHICH REQUIRES SEX DISCRIMINATION CONFLICTS WITH TITLE VII JA-158

A. The PDA Does Not Permit Preferential Treatment of Females JA-158

B. Classifications Based Upon Pregnancy Are Unlawful and Preempted By Title VII JA-161

III THIS CASE IS RIPE FOR ADJUDICATION—AS THIS COURT HAS ALREADY HELD JA-163

IV CONCLUSION JA-165

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) JA-164, 165

Burns v. Rohr Corporation, 346 F. Supp. 994 (S.D. Cal. 1972) JA-162

Department of Fair Employment and Housing v. Galusha Corporation, Case No. FEP 80-81, K7-592s, L-26382, 84- (1984) JA-156

Department of Fair Employment and Housing v. Hyman Goldberg, dba Dyn-Aura Engineering Laboratories, Case No. FEP 81-82, D8-03725, L-29780, 84-05 (1984) JA-156

Department of Fair Employment and Housing v. Travel Express, Case No. FEP 80-81, A7-09925, N-18709, 83-17 (1983) JA-156

Fullilove v. Klutznick, 448 U.S. 448, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) JA-159, 160, 161

General Electric Co. v. Gilbert, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976) JA-163

Homemakers, Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied,* 423 U.S. 1063 (1976) JA-162

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. ——, 77 L. Ed. 2d 89, 103 S. Ct. 2622 (1983) JA-158, 159

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) JA-161, 162

Page(s)

Federal Statutes

Civil Rights Act of 1964, as amended

Title VII, 42 U.S.C. § 2000e-7 .....JA-161

Title VII, 42 U.S.C. § 2000h-4 .....JA-161

Others

Brief for the Equal Employment Opportunity Commission, *Newport News Shipbuilding & Dry Dock Co. v. EEOC, reprinted in BNA's Law Reprints, Labor Law Series,* Volume 16, No. 25, 1982/83 Term, p. 179 .....JA-159

29 C.F.R. § 1604.10(b) JA-159

Proposed Regulation § 7291.2, "Pregnancy, Childbirth or Related Medical Conditions" JA-156

I

PLAINTIFFS' COMPLIANCE WITH TITLE VII IS NOT RELEVANT TO THE DETERMINATION OF WHETHER STATE LAW CONFLICTS WITH TITLE VII.

In their response to plaintiffs' summary judgment motion, defendants assert that a material issue of fact exists because plaintiffs have not proven that they are in compliance with Title VII in applying the provisions of their disability leave policies. This assertion completely mistakes the entire thrust of this lawsuit.

Plaintiffs contend that state law which mandates preferential treatment of females returning from a pregnancy disability leave by requiring guaranteed reinstatement conflicts with Title VII and is therefore preempted under the Supremacy Clause. There is no dispute that the state law requires preferential treatment. The parties have stipulated that defendants enforce state law in accordance with proposed regulation Section 7291.2, "Pregnancy, Childbirth or Related Medical Conditions" (Stipulated Findings of Fact, Numbers 18 and 19). That regulation requires an employer to reinstate an employee returning from a pregnancy disability leave to her original job unless the employer can prove business necessity. (Section 7291.2(b)(7)). Further, the Fair Employment and Housing Commission (the "Commission") in *Department of Fair Employment and Housing v. Travel Express,* Case No. FEP 80-81, A7-09925, N-18709, 83-17 (1983) and in *Department of Fair Employment and Housing v. Hyman Goldberg, dba Dyn-Aura Engineering Laboratories,* Case No. FEP 81-82, D8-03725, L-29780, 84-05 (1984) has unequivocally held that guaranteed reinstatement is required under state law. Indeed, on March 1, 1984, the Commission rendered yet another decision so holding, *Department of Fair Employment and Housing v. Galusha Corporation,* Case No. FEP 80-81, K7-592s, L-26382, 84- (1984). A copy of this decision is attached as Exhibit A.

The issue in this case is simple and straightforward—whether this state law conflicts with Title VII. This Court is not being asked to determine whether California Federal Savings and Loan Association ("Cal Fed") and the members of the plaintiff Associations are in compliance with Title VII. Such a finding is not necessary to a determination that the state law establishing an improper sex-based classification violates Title VII.

Even if Cal Fed were not in compliance with Title VII, which is clearly not the case, that determination would in no way validate the enforcement of a state law which itself requires the violation of Title VII by compelling employers to engage in sex discrimination. Cal Fed's policy (and the policies of members of plaintiff Associations) and the Garland accusation simply establish the existence of a case or controversy since the State seeks to compel Cal Fed to comply with state law requiring sex discrimination. It makes no difference whatsoever to the validity of state law and defendants' enforcement of state law that plaintiffs are or are not in compliance with Title VII. Defendants assert that "[w]hether plaintiffs comply with Title VII is irrelevant to defendants' position that the state statute is not preempted by federal law." (Defendants' Memorandum in Response to Plaintiffs' Motion For Summary Judgment (hereinafter "Defendants' Response"), p. 8, n. 3, lines 22-24). Similarly, plaintiffs' compliance with Title VII is irrelevant to plaintiffs' position that the state statute *is* preempted by federal law.[1]

---

[1] In any event, the State in its Accusation seeks to compel Cal Fed to conform its policy which, as required by Title VII, provides the same treatment to females disabled by pregnancy as to other disabled employees, to the requirements of state law. Even if Cal Fed failed to follow its policy in practice, the State seeks to compel a change in the policy which clearly does comply with Title VII.

II

A STATE LAW WHICH REQUIRES SEX DISCRIMINATION CONFLICTS WITH TITLE VII.

Defendants make two arguments to support the proposition that a state may, by law, establish a classification based upon sex without having that law preempted by the prohibition against sex discrimination contained in Title VII. Once again it is asserted that the Pregnancy Disability Act ("PDA") simply requires that women be treated no less favorably than other workers, and permits discrimination in their favor. Second, it is contended that, because this state law is "good" sex discrimination, it should not be struck down in the same manner as other women's protective laws. Both arguments are clearly meritless as a matter of law.

A. The PDA Does Not Permit Preferential Treatment of Females.

Defendants' contention that the PDA merely insures that disabilities caused by pregnancy are not treated "less favorably" than other disabilities ignores the clear language of the statute itself which requires that pregnancy-related disabilities be treated "the same" as other disabilities. Defendants' statement that the "EEOC would not consider the state statute in issue here to be in conflict with Title VII (Defendants' Response, p. 14), is clearly erroneous. As succinctly stated by the EEOC in its Supreme Court brief filed in *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. —, 77 L. Ed. 2d 89, 103 S. Ct. 2622 (1983):

> As the most comprehensive federal fair employment statute ever enacted, Title VII invests in all workers, men as well as women, the right to be free of discriminatory treatment in the work place. It prohibits the employment of men, as well as women, under terms and conditions less favorable than those accorded similarly-situated members of the opposite sex and, conversely, *forbids preferential treatment of women as well as men on the basis of their sex.*

Brief of the EEOC, *reprinted in BNA's Law Reprints, Labor Law Series,* Volume 16, No. 25, 1982/83 Term, p. 179. The EEOC further stated, "[a]lthough Congress clearly intended to require non-discriminatory treatment of women employees, *it certainly did not intend to require discrimination in their favor. . .*" (emphasis added). *Id.* at 161. (A copy of the EEOC Brief is attached hereto as Exhibit B for the Court's convenience.)

Moreover, the EEOC Guidelines are absolutely clear with respect to the reinstatement issue. The Guidelines specifically provide that "[w]ritten or unwritten employment policies and practices involving matters such as . . . reinstatement . . . shall be applied to disability due to pregnancy, childbirth or related medical conditions on *the same* terms and conditions as they are applied to other disabilities." 29 C.F.R. §1604.10(b) (emphasis added). Plaintiffs respectfully refer the Court to Plaintiffs' Opposition to Defendants' Motion For Summary Judgment, pp. 22-24 for a fuller discussion of this issue.

Defendants apparently contend that a state law requiring preferential treatment would be an "affirmative justification" (Defendants' Response, pp. 16-17) and exempt California employers from charges of discrimination against male employees. *Newport News* does not support such a theory. The footnote cited by defendants merely recognizes affirmative defenses such as "business necessity" or those available under the Equal Pay Act. 77 L. Ed. 2d at 102 n.23.

Defendants' reliance on *Fullilove v. Klutznick,* 448 U.S. 448, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980), to support the State's argument that plaintiffs need not be concerned

about engaging in unlawful discrimination against male employees is not well taken. *Fullilove* does not involve employment or a Title VII question, but deals with whether a *federal* law which encourages certain preferential treatment of minority business enterprises violates the Equal Protection Clause. The determination of whether a racial classification that provides benefits to minorities for the purpose of remedying past discrimination is valid under the Equal Protection Clause, however, is not the same as whether such a classification is unlawful under Title VII. *See Fullilove v. Klutznick,* 448 U.S. at 519 (Marshall, J., concurring).

Moreover, the Public Works Employment Act of 1977 upheld on equal protection grounds in *Fullilove* is vastly different from the state law at issue here. In *Fullilove,* the federal law required minority business "set-asides" as a condition of doing business with the government. Here, the state law requires employers to discriminate against males disabled by medical conditions in every case.

Finally, the *Fullilove* decision was based in large part on the Court's deference to the Congress of the United States. As noted by Chief Justice Burger,

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . General Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.

448 U.S. at 472. The Court reiterated this point throughout the opinion.

> Again, we stress the limited scope of our inquiry. Here we are not dealing with a remedial decree of a court but with the legislative authority of Congress.

448 U.S. at 480. This same deference is not accorded to state law. A state law which conflicts with federal law is void under the Supremacy Clause.

There is no doubt that Congress may amend Title VII or enact laws which supersede Title VII (assuming, of course, that they pass Constitutional muster). States may not enact laws which conflict with Title VII, since Congress has declared such laws invalid. (42 U.S.C. §§ 2000e-7 and 2000h-4).

B. Classifications Based Upon Pregnancy Are Unlawful and Preempted By Title VII.

Defendants ask this Court to disregard the numerous decisions invalidating state laws restricting the employment opportunities of women or requiring that benefits be extended to women. It is argued that the state law here was enacted with good intentions and to prevent adverse impact on females and that, therefore, this state law is not an invalid women's protective law.

These same arguments have historically been advanced by those seeking to uphold statutes requiring that women workers be treated in a manner different from male workers. In *Rosenfeld v. Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971), the Ninth Circuit struck down an employer's policies based upon state labor laws which did not allow women to exceed certain weight-lifting limits:

> It would appear that these state law limitations upon female labor run contrary to the general objectives of Title VII of the Civil Rights Act of 1964. . . and are therefore, by virtue of the Supremacy Clause, supplanted by Title VII. . . . This argument [that the restrictions are valid] assumes that Congress, having established by Title VII the policy that individuals must be judged as individuals, and not on the basis of characteristics generally attributed to racial, re-

ligious, or sex groups, was willing for this policy to be thwarted by state legislation to the contrary.

We find no basis in the statute or its legislative history for such an assumption.

444 F.2d at 1225.

Not only have statutes imposing *restrictions* on females been struck down, statutes compelling the extension of *benefits* to women have also been struck down. *Homemakers, Inc. v. Division of Industrial Welfare,* 509 F.2d 20 (9th Cir. 1974), *cert. denied,* 423 U.S. 1063 (1976) (overtime pay) and *Burns v. Rohr Corporation,* 346 F. Supp. 994 (S.D. Cal. 1972) (rest breaks). In *Burns,* the Court considered the issue of whether the requirement of preferential treatment was consistent with the purposes of Title VII and unequivocally rejected that assertion. The Court noted:

> [I]n recent years courts have ruled invalid as being in conflict with Title VII state statutes and regulations issued thereunder which have tended to make women less desirable for hiring because of the special accommodations that the prospective employer must make for them [citations omitted].
>
> • • •
>
> The Court, therefore, holds that the state regulation requiring rest breaks for women is contrary to the objectives of Title VII of the Civil Rights Act of 1964, and it is, therefore, preempted by Title VII by virtue of the Supremacy Clause.

346 F. Supp. at 997-98.

The self-evident fact that only women can become pregnant merely demonstrates that the state law at issue requiring guaranteed reinstatement of employees returning from a pregnancy disability leave is a women's protective

law. The decision in *General Electric Co. v. Gilbert,* 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976), was bottomed on the same theory now advanced by defendants. The Supreme Court held that classifications based upon pregnancy were acceptable and that pregnancy discrimination was not sex discrimination. Defendants now assert that a classification based upon pregnancy is not sex discrimination because only women can become pregnant. The only difference is that in *Gilbert,* pregnancy disability was treated less favorably than other disabilities while the state law at issue here requires preferential treatment. If *Gilbert* were still good law, defendants' argument might have merit. However, the PDA was enacted with the express purpose of overruling *Gilbert;* classifications based upon pregnancy are unlawful and discrimination based upon pregnancy is sex discrimination. The state statute at issue here must be declared invalid as have prior women's protective laws. Defendants have not cited even one case to this Court upholding a state statute requiring preferential treatment of women based upon pregnancy or any other basis.

III

THIS CASE IS RIPE FOR ADJUDICATION—AS THIS COURT HAS ALREADY HELD.

Defendants improperly attempt to reopen the issues of ripeness and exhaustion of administrative remedies on which this Court has already ruled. These issues were previously raised by the State in its Motion to Dismiss and in opposing Cal Fed's Motion for a Preliminary Injunction. (Defendants' Motion to Dismiss, dated 8-15-83, pp. 10-18; Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, dated 8-8-83, pp. 15-18.) In granting Cal Fed's Motion for a Preliminary Injunction and denying defendants' Motion to Dismiss on September 6, 1983, this Court has ruled against defendants on the same arguments that they now repeat.

There is no doubt that this Court was correct in its earlier ruling. It is clear that Cal Fed is not required to exhaust any administrative remedy because that remedy is plainly inadequate and pursuit of an administrative remedy would be futile given defendants' stipulated enforcement policies and the Commission's decisions. *See* Reply of Cal Fed to Defendants' Opposition to Motion for Preliminary Injunction, dated 8-12-83, pp. 9-14. Moreover, the doctrine of exhaustion of administrative remedies does not include review in the state courts as defendants contend. Defendants' assertion that "the California courts may grant plaintiffs appropriate relief" (Defendants' Response, p. 23), does not rob a federal court of its jurisdiction when plaintiffs have chosen to bring their action in federal court. Any argument to the contrary is absurd and would result in federal courts lacking jurisdiction in any actions where federal and state courts have concurrent jurisdiction.

Defendants' assertion that this case is not ripe because "an administrative hearing has yet to be held" and "no administrative finding has been made with respect to whether Cal Fed has even violated the state statute" has no merit. (Defendants' Response, p. 21). The facts are undisputed that Cal Fed failed to guarantee reinstatement and to hold open the complainant's job while she was on a pregnancy disability leave as required by state law. It is also undisputed that Cal Fed's policy which the State seeks to have conformed to state law does not guarantee reinstatement to females disabled by pregnancy. (*See* Plaintiffs' Motion For Summary Judgment, p. 7).

The issue of ripeness arises in the context of determining whether there is a case or controversy such that the Court has jurisdiction to hear the action. The question of ripeness turns on "the fitness of the issue for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387

U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). Here, the controversy is ripe in that an actual controversy exists, in that the preemptive issue is a purely legal one, and in that postponement of judicial action would work a substantial hardship on plaintiffs because of the conflict between state and federal law. *See* Plaintiffs' Opposition to Defendants' Motion to Dismiss, dated 8-25-83, pp. 10-17.

IV

CONCLUSION

One simply fact remains. Discrimination based upon sex and pregnancy is unlawful under federal law. The California state law at issue herein establishes a sex-based classification, and defendants are actively enforcing the law to compel California employers to engage in sex discrimination.

Defendants' motion for summary judgment must be denied and plaintiffs' motion for summary judgment granted.

DATED: March 12, 1984.

GIBSON, DUNN & CRUTCHER
JEROME C. BYRNE
WILLARD Z. CARR, JR.
PAMELA L. HEMMINGER
JAN E. EAKINS

By: /s/ PAMELA L. HEMMINGER
Pamela L. Hemminger

Attorneys for Plaintiffs
California Federal Savings and
Loan Association, Merchants and
Manufacturers Association, and
California Chamber of Commerce

EXHIBIT A

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA

Case No. FEP80-81
K7-592s
L-26382
84-

In the Matter of the Accusation of the

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,

v.

GALUSHA CORPORATION,

Respondent.

JANIS L. SNYDER,

Complainant.

DECISION

This case was first heard on behalf of the Fair Employment and Housing Commission by Administrative Law Judge ("ALJ") Ronald M. Gruen on May 20, 1982 at Santa Ana, California. Brian Hembacher, Staff Counsel, represented the Department of Fair Employment and Housing (at times hereafter "Department" or "DFEH"). Manning J. Eldridge, Counsel, represented respondent Galusha Corporation. Oral and documentary evidence was introduced and the case was submitted for decision at the conclusion of counsels' oral arguments at the hearing. ALJ Gruen submitted a proposed decision to the Commission on June 4, 1982, and the transcript was received by the Commission on June 18, 1982. After review of the record, argument and proposed decision, the Commission, on September 3, 1982, notified the parties of the opportunity for further written argument. Respondent Galusha Corporation then changed attorneys; Walter N. Wetterman was substituted in as counsel for respondent. Pursuant to agreement and stipulation between the parties, and for good cause shown, we then granted an extension of time for submission of further written argument. Briefs were then timely filed by both the Department and respondent on November 12, 1982. At the same time, respondent's new and present counsel in this matter moved the Commission to receive certain additional evidence which respondent either failed to offer or objected to at the hearing. Department Counsel filed opposition to this motion. On November 18, 1982, we issued an Order Granting and Denying in Part respondent's motion.[1] Because the parties were unable to agree on receipt of certain documentary evidence, on December 14, 1982, we ordered the case remanded to ALJ Gruen for the taking of certain further evidence pursuant to section 11517, subdivision (c) of the Government Code.

This matter was then heard further on behalf of the Commission by ALJ Gruen on March 24 and 25, 1983. Brian Hembacher represented the Department and Walter N. Wetterman represented respondent Galusha Corporation. Both parties filed written argument subsequent to the hearing and on July 8, 1983, the matter was deemed submitted. ALJ Gruen submitted a proposed decision to the Commission on August 1, 1983, and the transcripts were received on August 3, 1983. On November 2, 1983, we notified the parties of the opportunity for further writ-

---

[1] One piece of evidence respondent now sought to have admitted was respondent's written policy manual, offered by the Department at hearing, the admission of which was opposed by respondent's former counsel. Since this one document had previously been offered and is relevant to the resolution of this case, counsel were urged, in the aforementioned Order, to confer and if possible stipulate to its admission. Respondent's present counsel then informed us that he was unable now to stipulate to admission of this document.

ten argument. Both parties timely filed further argument; briefs were received by the Commission on December 9 and December 12, 1983.

After careful consideration of the entire record and all arguments of the parties, the Commission makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On March 12, 1981, complainant Janis L. Snyder, a woman, filed a verified written complaint with the Department, alleging that respondent Galusha Corporation had discriminated against her during the preceding year in violation of Government Code section 12945. In the complaint, Snyder alleged that on December 16, 1980, after her December 12, 1980 departure to begin a pregnancy disability leave, respondent informed her in writing that it was refusing to grant her any sort of "maternity" leave whatsoever, stating that it could not assure Snyder of a position when she was ready to return to work. Thus Snyder alleged, respondent discriminated against her on account of her sex, female, and her status, pregnant.

2. Respondent Galusha Corporation is an employer within the meaning of section 12926, subdivision (c) of the Government Code.

3. Joanne A. Lewis, in her official capacity as Director of the Department of Fair Employment and Housing, issued the accusation and amended accusation in this matter on February 24, 1982 and March 1, 1982, respectively.

4. The Department of Fair Employment and Housing has complied with all procedural requirements of the Fair Employment and Housing Act. (Gov. Code, § 12920 et seq.; at times hereafter "the Act" or "FEHA.")

5. Respondent Galusha Corporation is an advertising agency in the business of selling creative advertising to

"high tech" electronics firms in southern California. During the pertinent time period, Galusha Corporation employed eleven individuals.

6. Snyder began working full-time for respondent on March 1, 1978, and was so employed until December 12, 1980. During such time, she variously worked as receptionist/secretary, office manager, and executive secretary to Frank Galusha, President of respondent corporation. Snyder and Frank Galusha testified that from September 1980 to December 12, 1980, Snyder worker only part-time, 30 hours per week, due to illness associated with her pregnancy. Her rate of pay as of December 12, 1980, was $7.49 per hour.

7. In May of 1980 when Snyder learned of her pregnancy, she discussed it, her need for pregnancy leave, and her intent to return to respondent after her leave, with Frank Galusha and Paul Brugman, former Vice President of Operations for respondent. Snyder estimated that her due date was January 1981.

8. In November 1980, Snyder and Frank Galusha agreed that her last day of work before her leave would be December 12, 1980.

9. On December 10, 1980, Snyder gave respondent a written memo memoralizing their previous oral agreement that she would be commencing her pregnancy leave in a couple of days. In accordance with their prior discussions and pursuant to respondent's written policies concerning leaves of absence, Snyder's memo noted that the period of leave was to be open-ended, ranging from three to six months.

Two days later, as Snyder prepared to depart on her leave, Frank Galusha informed her that the wording of her memo was "not satisfactory," and that he would consult his attorney and get back in touch with her.

10. On December 16, 1980, after commencing her leave on December 12, Snyder received a letter from Frank Galusha denying her leave. The letter listed the reason for its denial as "due to the size of our company, it is simply not feasible to guarantee that your position or a similar one will be open when you are ready to return to work." (Exhs. 3 and O.) It thanked her for her service to the company and wished her well in the future. Snyder understood the letter to be a notice of termination.

11. Snyder experienced morning sickness, edema—swelling of her feet and hands, and other difficulties attendant to her pregnancy. She was disabled by the pregnancy from the date of her departure for her pregnancy leave (December 12, 1980) until March 11, 1981, the date on which her physician certified her readiness to return to work.

12. As of December 12, 1980, Snyder had no accrued sick leave or vacation remaining and thus none available to use during her leave.

13. At the time just prior to her departure for her pregnancy leave, Snyder's work primarily consisted of putting Galusha Corporation's business onto a newly purchased small business computer system. Frank Galusha testified that he intended that Snyder return to her work on the computer subsequent to her leave because no one else was fully trained in this operation.

14. At Frank Galusha's instruction, Snyder interviewed and hired her replacement in August 1980. The plan was that the individual hired would, on Snyder's return to work, continue to function as the office manager and secretary and Snyder would assume her computer functions. Alternatively, the replacement would be given new job functions and Snyder would return to her prior job. The various parties determined that final resolution of this matter would be left for Snyder's return.

15. Frank Galusha testified that although Snyder had ongoing problems concerning tardiness and some problems pertaining to attendance, he never attempted or considered terminating her because of them. On the contrary, according to Vice President Paul Brugman, Snyder "always did the job perfectly." (See also Exh. 6, signed by Snyder on April 1, 1980.) Moreover, with regard to tardiness, since Snyder had some problems in this area throughout her employment, she and Frank Galusha eventually agreed that she could compensate for her tardiness by simply making up the lost time at the end of the day. This she did.

16. When Snyder received Galusha's December 15, 1980 letter denying her leave, she was "floored" and very upset. She was further upset, because she understood the letter to be a notice of termination.

17. Pursuant to the terms of respondent's written policy, employees on leaves of absence for periods of time exceeding one month may elect to continue their health insurance coverage by making the premium payments themselves. However, in Snyder's case, although she timely tendered payment of the premium pursuant to the terms of the invoice (Exh. 12), she was later notified by a letter from respondent that her insurance had been cancelled retroactive to December 15, 1980, her "termination date." (Exh. 8.)

18. Snyder was informed by Galusha's insurer that her coverage in fact ceased as of January 8, 1981. Therefore, the lapsed insurance did not cover pregnancy and delivery-related medical costs of $113.13, $141.84, and $120.00, under a corporate reimbursement policy. These amounts total $374.97.

19. Frank Galusha's December 15, 1980 letter of denial was sent to Snyder after Frank Galusha consulted his attorney regarding Snyder's right to a pregnancy disability leave. Frank Galusha wrote this letter after speak-

ing on the telephone with his attorney, because he wanted to answer Snyder quickly; she had already begun her pregnancy leave.

20. Although respondent's written policy manual contains provisions for various types of leaves of absence, it has no specific provision for disability leaves. For this reason, Frank Galusha testified, he simply formulated a disability leave policy as to Snyder. In formulating this policy, Galusha took into consideraton Snyder's performance as well as the fact that her computer duties were somewhat specialized and no one else was trained yet to perform them. Thus, testified Frank Galusha, he evaluated Snyder's request for pregnancy disability leave "on the merits"; her pregnant condition was but one of the factors he considered.

Galusha also testified that several months prior to December, when he denied Snyder's leave, he had been willing to grant her a leave. He testified that in his opinion Snyder was not disabled by her pregnancy, although she experienced some swelling. In his opinion, pregnancy is "not very disabling for most women." The basis for his opinion on this matter is the fact that he has fathered three children. Galusha also said that most pregnant women should and do work until very close to the time of delivery.

21. Snyder at all times indicated her desire and intent to return to work for Galusha Corporation. Frank Galusha, too, testified that nothing Snyder actually said suggested that she intended to do other than return to Galusha. Yet, Frank Galusha "inferred" that she did not want to return, and several of respondent's witnesses (all currently employed by Galusha) also testified that although Snyder never actually said so to them, they "believed," "inferred," or "felt" that Snyder would not return to work there. Their conclusions were based on their perception of Snyder's interest in parenting and her

"attitude" toward the company rather than on any express statements made by Snyder.

22. Snyder testified regarding her reasons for not contacting Galusha Corporation when she was ready to return in March of 1981. She had received the termination letter in December, immediately after commencing what she had thought would be her pregnancy disability leave. When she then filed her complaint with the Department in March of 1981, she was told that she would be hearing from the Department in the near future. Snyder did not seek employment elsewhere at this time because she very much wanted her former position back and did not want to obtain work elsewhere, only to have to leave it when she returned to Galusha.

23. In September of 1981, Snyder was employed for four days as a demonstrator of health and sports equipment. She was forced to leave this work when her baby sitter resigned and she was unable to find other child care in time to keep this job. Snyder has not sought employment elsewhere in the time since September of 1981.

24. Respondent Galusha Corporation has previously granted what it termed a "maternity leave" to one other individual. This "leave" was for a period of thirteen months, after which the employee, Cynthia Viola, returned to work for Galusha. When Viola left respondent's employ to give birth, the arrangement was that Galusha would not guarantee her a job, but would try and re-employ her in some capacity, if and when she was ready to return. Viola's absence was thus not really a leave, since her return and a job were not part of the agreement.

25. As of March 24, 1983, according to Frank Galusha, Galusha Corporation still had no policy provision for pregnancy disability leaves. Rather, decisions concerning these leaves were still based on the individual's performance and qualifications. Prior to December 12, 1980, accord-

ing to both Frank Galusha and Janis Snyder, Galusha had never mentioned consideration of these factors in discussing Snyder's upcoming pregnancy disability leave.

26. In March of 1981, Priscilla Ekedahl was terminated; she is the woman hired in September 1980 to perform Janis Snyder's job functions during her pregnancy disability leave. Although Galusha knew that Snyder wanted to return and intended to return, he failed to contact her and did not inform her that the job was available. Throughout the time when Snyder's leave was under discussion, Galusha consistently hold Snyder that her job would be there when she was ready to return.

DETERMINATION OF ISSUES

I. Liability

The Department argues that respondent Galusha Corporation is liable for denying complainant Janis L. Snyder a pregnancy disability leave. Respondent will be found liable if we determine that respondent's conduct constitutes discrimination under the Act, and if so, that this discrimination is not rendered lawful by an affirmative defense.

A. Discrimination

The Department asserts that respondent Galusha Corporation discriminated against Snyder when it denied her the right to take a pregnancy disability leave, in violation of Government Code secton 12945, subdivision (b)(2). This section provides that it is unlawful for an employer to refuse to allow a female employee:

> to take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this pe-

> riod of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. . . (Gov. Code, § 12945, subd. (b)(2).

Moreover, female employees who take pregnancy disability leaves pursuant to Government Code section 12945, subdivision (b)(2) have a right to return to their same or similar positions at the end of their leaves. (*DFEH* v. *Travel Express* (1983) FEHC Dec. No. 83-17, at p.8 [1982-83 CEB 16].) Obviously this is so because the term "leave" implies that the individual taking such a leave has the employer's permission to be absent from work for a certain period of time without a change in her work status as a result of that absence.

Respondent mistakenly contends that the Department must establish the existence of sex discrimination and must do so by showing that it treated females differently than it treated males. On the contrary, the Department has not charged respondent with a violation of Government Code section 12940, subdivision (a), which covers sex discrimination.[2] Rather, respondent is charged with a statutory violation of a separate section of the Act, section 12945, subdivision (b)(2); that section makes it an unlawful employment practice simply to deny a female employee a pregnancy disability leave. Thus, if a preponderance of the evidence establishes that respondent denied Snyder her statutory right to take such a leave, we will find that the Department has established the existence of unlawful discrimination. The Department has done so here.

---

[2] As our regulations and Title VII of the Civil Rights Act of 1964 make clear, inasmuch as only females can and do become pregnant, discriminatory treatment on account of pregnancy, in and of itself constitutes sex discrimination. (Cal. Admin. Code, tit. 2, § 7291.2; 42 U.S.C. 2000e, subd. (k).)

B. Violation: Denial of Leave

Complainant Snyder was employed in a variety of capacities commencing March 1, 1978, and continuing until December 12, 1980. In May of 1980, Snyder learned that she was pregnant and informed President Frank Galusha and Vice President Paul Brugman. Snyder discussed her pregnancy and her planned leave with both individuals on more than one occasion. Galusha agreed that Snyder should hire and train someone who would assume her job functions when her leave commenced. Throughout these discussions, Galusha never indicated that any factors other than Snyder's pregnancy would be considered with regard to her upcoming pregnancy leave. Throughout this time, discussion of the time period of the leave left the time flexible within a range of 3-6 months. This 3-6 month period was derived from Galusha Corporation's written policy manual which provided for leaves of absence of up to 6 months' duration. Although the written policy manual contained no specific provision for disability leaves, there is evidence that some employees had been granted them for periods of ten days to two weeks.

In November 1980, Snyder and Frank Galusha agreed that her last day of work before her leave would be December 12, 1980. On December 10, 1980, Snyder gave respondent a written notice memoralizing their previous discussions and oral agreement that she would be starting on a pregnancy disability leave of some 3-6 months' duration in a couple of days. On December 12, 1980, Frank Galusha informed Snyder that the wording of her memo was "not satisfactory." He told her that he would talk to his attorney and get back in touch with her. He did not say that he now intended to deny the leave which previously he had agreed to. On December 16, 1980, Snyder received the letter from Frank Galusha denying her leave and thanking her for her services to the company. Snyder understood this letter to be a denial of the leave and

therefore a letter of termination. She was very upset when she received the letter, since Frank Galusha had never intimated that he intended to do other than go ahead with the plan to provide her with a pregnancy disability leave.

Respondent has contended at various time during these proceedings that it did *not* deny Snyder a pregnancy disability leave; it *did* deny Snyder's leave, but with justification; it did *not* terminate her; it *did* terminate her, but it had justification for doing so. We find that in denying Snyder the leave, and thus terminating her employment, respondent violated Government Code section 12945, subdivision (b)(2).

Respondent now asserts that its denial of Snyder's leave is legally justified by the affirmative defenses of bona fide occupational qualification ("BFOQ") and business necessity. Respondent will be liable for its unlawful refusal to permit Snyder to take a pregnancy disability leave unless it is able to establish one or the other of these two defenses.

II. Affirmative Defenses

A. BFOQ

Respondent asserts that punctuality and attendance are essential job qualifications for work with Galusha Corporation and mistakenly contends that as such these amount to bona fide occupational qualifications. Thus, argues respondent, since Snyder experienced some difficulty pertaining to punctuality throughout her employment with Galusha Corporation, she lacks an essential BFOQ for the job she previously held.

The BFOQ defense, as outlined in Commission Regulations and interpreted in Commission Decisions (Cal. Admin. Code, tit. 2, § 7286.7, subd. (a); *DFEH* v. *Alameda County Sheriff's Dept.* (1981) FEHC Dec. No. 81-13 [1980-

81 CEB 25]), pertains only to an employer's categorical exclusion of entire classes of individuals *based on their status as it is protected under the Fair Employment and Housing Act.*

Here, respondent does not seek categorically to exclude all women who are or may be pregnant. Neither does respondent claim that pregnant females are never entitled to take a pregnancy disability leave. Instead, respondent is attempting to justify its denial of Snyder's leave by claiming that her attendance was sufficiently poor to justify her termination. Since respondent's conduct is not derived from a policy of categorical exclusion, the BFOQ defense is unavailable here. We turn now to its next asserted defense, that of business necessity.

B. Business Necessity

Respondent next asserts that the relatively small size of the company made it impossible to guarantee that Snyder's job would be available when she was ready to return. Respondent says holding her job open, in light of her tardiness and attendance problems, would have imposed financial hardship on Galusha Corporation. Thus, urges respondent, this potential financial hardship made denial of the leave a "business necessity." Respondent misunderstands the nature of this defense.

Where an employer has a facially neutral practice which is discriminatory in effect, the employer must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and the challenged practice effectively fulfills the business purpose it is supposed to serve. Even if the employer makes such a showing, the practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well, with a less discriminatory impact. (Calif. Admin. Code, tit. 2, § 7286.7, subd. (b).)

Here, using the term of art "business necessity" respondent argues that granting Snyder's request for a pregnancy disability leave would have placed business or financial hardships on respondent. In essence, respondent asserts that because it is a relatively small employer, it is unable to guarantee a pregnant employee the right to return to her former or a similar position. In particular, urges respondent, it has no legal duty to provide a right to return to an employee who has been excessively tardy and absent, at times. Whatever the circumstances, the refusal to provide for a right to return amounts to the denial of a pregnancy leave. If respondent was unhappy with Snyder's attendance and punctuality throughout her tenure, the mere fact that she became pregnant and sought a disability leave did not give respondent license to take advantage of the request for a leave by instead terminating her.

Respondent appears to argue that its "facially neutral practice" which is discriminatory in effect, is its policy of denying disability leaves longer than ten days to any individuals who have problems pertaining to punctuality and attendance, regardless of their condition of disability.[3] Respondent then argues that this practice is "necessary to the safe and efficient operation of its business" and impliedly argues that the challenged practice effectively fulfills the purpose it is supposed to serve. Although respondent fails to identify its "overriding legitimate business

---

[3] The evidence shows that both Snyder and another employee were granted disability leaves of absence for illness and/or injury, lasting ten days to two weeks. There is nothing in the record to indicate that punctuality and attendance were considered in the granting of these leaves. Obviously, since most pregnancy-related leaves are of longer duration than ten days, respondent's consideration of factors other than the condition necessitating the leave (when a longer leave is requested) will adversely affect pregnant females.

purpose'' which its practice purportedly serves, let us assume for a moment that the purpose is that of doing business and making a profit. Respondent's claim that Snyder's functions as Office Manager and Executive Secretary were sufficiently unique so as to preclude a lengthy absence is disproved by the fact that with Frank Galusha's approval, Snyder hired and trained a replacement to perform these functions. Its additional claim that Snyder's computer-related functions made it equally impossible for her to take a leave are also disproved by Frank Galusha's testimony that he told Snyder, more than once, that she could return in this capacity and that it would be ideal both for her and the company if she did so. Thus, we can only conclude that respondent's claim of financial hardship is not true and that it was not the real reason for revoking, after Snyder's departure, its grant to her of a disability leave.

For the sake of argument, let us assume for a moment that respondent's financial hardship claim is true. Even it it were, and even if respondent had demonstrated that its policy of denying longer disability leaves, based on attendance and punctuality, was necessary to the safe and efficient operation of the business and that the practice effectively fulfilled its overriding business purpose, the practice might still be impermissible if an alternative practice exists which would accomplish the same business purpose with a less discriminatory inpact.

Here, an alternative practice does exist. Rather than revoking permission for Snyder's previously approved pregnancy disability leave once it had begun, Galusha could instead and should instead have issued timely warnings and taken suitable action, including termination, at the time long before her pregnancy when the attendance and tardiness problems developed and/or persisted.[4] It

[4] Respondent proffered two highly critical evaluations of Snyder (which she says she never saw), both dated during the time Galusha was aware of her pregnancy, which reprimand her for her tardiness and absences. (Exhs. A and B.) If respondent would now claim these as valid timely warnings, we hasten to note that respondent simultaneously and inconsistently also claims that it bent over backwards to accommodate Snyder during these periods of pregnancy-related illness (nausea and edema), by providing her with rest periods and additional sick leave.

should not later have taken advantage of the fact that they were exacerbated by pregnancy and then used Snyder's request and departure for her necessary pregnancy disability leave as an opportunity instead to terminate her. The evidence showed that Janis Snyder had problems in the area of tardiness and that these problems persisted throughout her employment with Galusha Corporation. Yet Frank Galusha testified that in spite of the problems, at no time did he consider terminating her because she was such a valued employee. Moreover, Snyder testified that she and Mr. Galusha had reached an agreement concerning her tardiness; Snyder worked later on days when she was late to work, in order to make up the lost time. The evidence clearly establishes that only when Snyder already had departed on her leave, did it occur to respondent to terminate her for problems which until then had been unworthy of termination.

Respondent argues that a tardy employee has no right to remain an employee and to take a leave. On the contrary, since pregnancy constitutes one of the bases over which the ambit of the Fair Employment and Housing Act's protections against employment discrimination extend, an employer has no right to take advantage of a woman's pregnancy and request for a leave, by terminating her when it has not sought to do so for reasons independent of her pregnancy, in the past.

Respondent has failed to establish the business necessity defense both on the merits and because alternative,

less discriminatory practices exist, which would equally well serve its needs. Thus, respondent's denial of Snyder's request for a pregnancy disability leave is not legally justified or excused and respondent is therefore liable for having violated Government Code section 12945, subdivision (b)(2). We turn now to issues of remedy.

III. Remedy

The Department requests that respondent be ordered to reinstate Snyder and to pay her the wages she will have lost up to that point, the medical expenses which would have been covered had her insurance not been terminated, compensation for her emotional injuries, and punitive damages in order to punish respondent for its deliberate and malicious conduct. Having established that respondent discriminated against Snyder in violation of the Act, the Department is entitled to these forms of relief in order to make Snyder whole for any loss or injury she suffered as a result of such discrimination. (Gov. Code, §12970, subd. (a); Cal. Admin. Code, § 7286.9; *DFEH* v. *Louis Cairo* (1984) FEHC Dec. No. 84-04 at p. 15 [1984-85 —]; *DFEH* v. *Northrop Services* (1983) FEHC Dec. No. 83-11, at pp. 13-16 [1982-83 CEB —]; *DFEH* v. *City of Simi Valley* (1983) FEHC Dec. No. 83-21, at p. 14 [1982-83 CEB —]; *DFEH* v. *Rayne Water Conditioning* (1982) FEHC Dec. No. 82-03, at p. 11 [1982-83 CEB 1].) The Department must demonstrate where necessary the extent and nature of any injury and respondent must demonstrate any bar or excuse it asserts to any part of these remedies.

A. Reinstatement

The Department asks that respondent be ordered to rehire Snyder to perform the job she was performing prior to her departure on what she thought was her pregnancy

disability leave. Respondent has not directly addressed this request of the Department.[5] We assume however that respondent would object to this request based on its claims that Snyder's punctuality and attendance were deficient. Inasmuch as the evidence shows that respondent did not consider terminating Snyder for these reasons until she requested a pregnancy leave, we must conclude that these reasons alone, apart from her pregnancy, would not have been the sole basis for her termination. Thus there is no bar to reinstatement. Respondent must rehire Snyder to perform the same duties she performed prior to her departure on what should have been her pregnancy disability leave. She is entitled to all of the benefits attendant to this position and respondent is admonished to pay particular attention to its obligation not to retaliate against her in any fashion. (Gov. Code, § 12940, subd. (e).)

B. Back Pay

The Department requests that respondent be ordered to pay Snyder the earnngs she can be expected to have received from respondent up until the time of her reinstatement. Respondent argues that Snyder should receive no back pay since she failed to mitigate her damages when, other than four days in September 1981, she did not work and did not seek to find other work during the liability period.

Respondent has the burden of proving that Snyder failed to mitigate her income loss after her termination. (*DFEH* v. *American Airlines* (1983) FEHC Dec. No. 83-15 [1982-

---

[5] Respondent might have avoided the obligation to rehire Snyder by demonstrating with clear and convincing evidence that, even had it not terminated her because of her pregnancy and request for a leave, it would still have dismissed her for other, wholly independent reasons (such as attendance and punctuality). (*DFEH* v. *City of Simi Valley, supra*, FEHC Dec. No. 83-21, at pp. 14-16.)

83 CEB —]; *DFEH* v. *City of Sacramento* (1983) FEHC Dec. No. 83-20 [1982-83 CEB —].) Respondent has met its burden of proof on this issue.

Snyder testified that during the period of time between March 1981 and September 1981, the only time she did work, she did not seek other employment because she had filed her complaint with the Department and was waiting to hear from it. Since we have no evidence of what was said and no basis to know what it is that Snyder believes gave her a reason to wait to look for other work, we cannot conclude that a delay of some 5-6 months is justified. Subsequent to the job she held for four days in September 1981, Snyder has not worked, has not sought other work, and at the time of the March 1983 hearing, still was not seeking work. While the law does require generally that employers demonstrate the existence of jobs for which the complainant was qualified, it would be unjust to require such a showing from respondent here and to order respondent to pay back pay when Snyder herself has testified that she simply did not seek other work. Accordingly, the Department's request for back pay for Snyder is denied.

C. Medical Expenses

The Department requests that respondent be ordered to pay Snyder the costs attendant to her pregnancy and delivery which were not paid by respondent's insurance, but which would have been paid had the insurance not been terminated as of January 8, 1981. These amounts are $141.84, $113.13, and $120.00. The first two amounts are pregnancy and delivery-related expenses which would have been covered by respondent's insurance, had it not been terminated by respondent. The third dollar amount is an additional amount which would have been covered by the corporate reimbursement policy. The total of these expenses is $374.97 and respondent must pay this amount to Snyder.

D. Compensatory Damages for Emotional Injury

The Commission has authority to award damages to compensate for emotional distress, shame, humiliation, and similar forms of emotional injury resulting from a respondent's discrimination. (*DFEH* v. *Ambylou Enterprises* (1982) FEHC Dec. No. 82-06, at pp. 9-11 [1982-83 CEB 3]; *DFEH* v. *San Francisco Municipal Railway (Eskridge)* (1982) FEHC Dec. No. 82-23, at p. 15 [1982-83 CEB 8]; *DFEH* v. *Louis Cairo, supra,* FEHC Dec. No. 84-04, at p. 19.) The evidence is clear that Snyder suffered emotional distress as a result of respondent's unlawful conduct. Snyder was "floored" and very upset when, on December 16, 1980, she received Frank Galusha's letter informing her that her leave had been denied and she was instead terminated. She was so distraught by the letter that she was unable even to call Frank Galusha to discuss it with him. We infer, too, an additional measure of emotional injury, based on the anxiety she no doubt suffered in being informed of her termination little more than one month before her delivery. Obviously, when Snyder left her employment on December 12, 1980, believing she had begun a disability leave, only to learn during the next week that she had instead been fired, the fact of the termination was worsened by its proximity to the date her delivery was scheduled. Considering this, we determine that an award of $2,000 will adequately compensate Snyder for this injury. Snyder will be owed interest on this amount, accruing at the rate of 10% per year, compounded annually, from the effective date of this decision until payment. (Code Civ. Proc., § 685.010.)

E. Punitive Damages

The Department asks that respondent be ordered to pay Snyder punitive damages because the nature of its conduct was sufficiently deliberate, egregious, and malicious to warrant such an award, and because the Department hopes it

will deter others from engaging in similar conduct. Resondent contends that its conduct does not warrant the imposition of punitive damages.

The Commission has authority to award punitive damages. (*DFEH* v. *Dyna-Med* (1982) FEHC Dec. No. 82-14 [1982-83 CEB 6]; *DFEH* v. *Ambylou Enterprises, supra,* FEHC Dec. No. 82-06; *DFEH* v. *Fresno Hilton Hotel* (1984) FEHC Dec. No. 84-03 [1984-85 CEB—].) The purpose of making such an award is to punish or make an example of respondent when it has engaged in, condoned, or ratified conduct which is oppressive, fraudulent, or malicious. (Civ. Code, § 3294.) Here the evidence is clear that respondent's denial of the leave was both fraudulent and malicious.

Frank Galusha agreed with Snyder's testimony that during the time in which the leave was under discussion, he was ready and willing to permit her to take a leave. He also agreed that at no time did he inform Snyder that any factors other than her pregnancy would have bearing on his decision. Moreover, throughout these discussions, he consistently led Snyder to believe that he had every intention of going through with his promise to give her the disability leave. Not even on December 12, 1980, when he protested her wording of the memo regarding the leave, did he even hint that he intended at this late hour to deny the leave which he had agreed to. Yet, after Snyder had actually departed on what she thought was her disability leave, respondent then took advantage of her absence and denied the leave, thereby terminating her.

In its brief in further argument received by the Commission on December 12, 1983, respondent suggests that "perhaps the respondent's timing was bad . . ." and that "complainant's pregnancy" was but "an incidental factor" in its decision. Notwithstanding these contentions, the evidence shows that respondent deliberately misled

Snyder. Provisions were made for her replacement during the time of her leave, as well as for the shifting of personnel upon her return. At no time was she informed that her termination, in lieu of a disability leave, was even being considered. Once she had been lulled into a false sense of security, Frank Galusha then took advantage of her absence and went ahead and terminated her with the full knowledge that her delivery was just over one month away. This conduct was both dishonest and malicious. Moreover, since Frank Galusha took this action after having consulted his attorney, he also acted in blatant and conscious disregard of her statutory right to such a leave.[8] If respondent truly believed that Snyder's performance warranted her termination, it should have terminated her rather than pretending to grant her a disability leave. Under the circumstances, respondent's timing, alone, was not bad; its motive was bad. We find that respondent acted fraudulently, deliberately, with malice, and in conscious disregard of Janis Snyder's statutory right to take a pregnancy disability leave. Accordingly, respondent is ordered to pay Janis Snyder $7,500 in punitive damages. Snyder also will be owed interest on this amount, accruing at the rate of 10% per year, compounded annually, from the effective date of this decision until payment. (Code Civ. Proc., § 685.010.)

---

[8] At times during these proceedings, respondent has argued that because the leave under discussion was one of 3-6 months' duration, it exceeds the statutory limit of 4 months, thereby fully justifying respondent's outright denial of any leave whatsoever. Respondent is wrong. The statute *requires* employers to provide *up to 4 months'* leave for pregnancy disability; employers with policies providing for lengthier leaves are certainly not precluded from making a greater amount of leave time available. Further, even if a woman asked for a leave longer than 4 months, the employer could limit the time to 4 months; it could not simply deny the request.

ORDER

1. Respondent shall commit no further violations of the Act and shall immediately cease and desist from its unlawful practice of denying disability leaves to female employees who are disabled by pregnancy.

2. Within 15 days of the effective date of this Decision, respondent shall offer to rehire Snyder immediately into the position from which she was discharged. If Snyder accepts the offer, respondent shall immediately hire Snyder into that position and accord her all seniority, rank, status, and other terms and conditions of employment she should have enjoyed on that date had she returned to work on March 12, 1981, and continued working for respondent until the date of her actual rehiring.

3. Within 30 days of the effective date of this Decision, respondent shall pay to Snyder $2,000 as damages in compensation for her emotional injury and $374.97 in compensation for her medical expenses which should have been covered by respondent's insurance, together with interest on these amounts, running from the effective date of this Decision to the date of payment, and compounded annually, at the rate of 10% per year. (Code Civ. Proc., § 685.010.)

4. Within 30 days of the effective date of this Decision, respondent shall pay to Snyder $7,500 in punitive damages in order to punish and make an example of respondent for its fraudulent and malicious conduct in denying Snyder's leave and thereby terminating her. Interest shall accrue on this amount at the rate of 10% per year, compounded annually, from the effective date of this Decision until paid. (Code Civ. Proc., § 685.010.)

5. Within 45 days of the effective date of this Decision, respondent shall notify the Commission in writing of the manner of its compliance with this Order.

Any party adversely affected by this Decision may seek judicial review of this Decision under Government Code section 11523 and Code of Civil Procedure section 1094.5.

Any petition for judicial review and related papers should be served on the Commission and copies should be delivered to all parties and complainant.

DATED: March 1, 1984

FAIR EMPLOYMENT AND HOUSING COMMISSION

/s/ (ILLEGIBLE)

/s/ (ILLEGIBLE)

/s/ (ILLEGIBLE)

/s/ (ILLEGIBLE)

/s/ (ILLEGIBLE)

EXHIBIT B

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1982

No. 82-411

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1a) is reported at 682 F.2d 113. The decision of the panel of the court of appeals (Pet. App. 2a-8a) is reported at 667 F.2d 448. The final opinion and order of the district court in Civil Action No. 80-20-NN (Pet. App. 9a-20a) is reported at 510 F. Supp. 66. The district court's final order in Civil Action No. 80-237-NN (Pet. App. 21a) is unreported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 22a-23a) were entered on June 22, 1982. The petition for a writ of certiorari was filed on September 10, 1982, and was granted on December 6, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, and the EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604, are set forth at Pet. 2-6.

STATEMENT

1. Congress enacted the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076 (Pet. App. 50a), in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), which held that pregnancy-related classifications did not on their face constitute sex-based classifications under Title VII. The PDA amended the "Definitions" section of Title VII to add subsection (k), which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions * * *." 42 U.S.C. (Supp. IV) 2000e(k).[1]

[1] The full text of the new subsection states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Within seven months after the PDA's passage, the Equal Employment Opportunity Commission revised its Guidelines on Discrimination Because of Sex to reflect changes required by the Act. The final guidelines, and an Appendix of 37 Questions and Answers, were published on April 20, 1979.[2] 44 Fed. Reg. 23804 (1979), codified at 29 C.F.R. 1604 and Appendix. The Answers to Questions 21 and 22 (at 140) set forth the Commission's position that Title VII, as amended by the PDA, requires that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions" (see Pet. 5-6).[3]

2. In September 1979, John McNulty, an employee of petitioner, filed a charge of discrimination with the EEOC against petitioner, alleging that it had unlawfully refused to provide full insurance coverage for his wife's hospitalization due to pregnancy (J.A. 15). One month later, a similar charge was filed on behalf of petitioner's male production and maintenance employees by the United Steelworkers of America, their collective bargaining representative (J.A. 16-18).

The petitioner's hospitalization and medical-surgical health insurance plan extends coverage to employees, their spouses, and unmarried children (Pet. App. 29a-30a). The "Basic Plan" generally pays in full for a semi-private hospital room for up to 120 days and hospital services

---

[2] Under Section 2(b) of the PDA (92 Stat. 2076), its provisions did not apply to fringe benefit plans until 180 days after enactment (*i.e.*, until April 29, 1979). Pet. App. 50a-51a.

[3] The guidelines also make clear that an employer is not obliged to provide the same level of health insurance coverage for pregnancy-related expenses of the spouses of male employees as it provides for its female employees. *Ibid.*

and "other necessary services while hospitalized up to 100% of the first $750, then 80% of the excess up to 120 days" (Pet. App. 31a-32a). A dependent's illness or injury is covered to the same extent as an employee's illness or injury, except that a dependent's pregnancy-related expenses are reimbursed only for "up to $500 of the hospital charges and 100% of reasonable and customary for delivery and anesthesiologist charges [sic]" (Pet. App. 37a).

Before the EEOC began to process the McNulty and Steelworkers charges, petitioner filed suit on January 31, 1980, against the Commission and the charging parties, seeking a declaratory judgment that the Commission's regulations interpreting the PDA were void, and requesting that the Court permanently enjoin EEOC from enforcing those interpretations (J.A. 5-14). After the Commission completed the processing of McNulty's charge, it filed suit on December 15, 1980, against petitioner under Section 706 of Title VII, 42 U.S.C. 2000e-5 (J.A. 28-30).

3. Before discovery commenced in the Commission's Title VII enforcement suit, the district court, on cross motions for summary judgment, ruled in favor of petitioner in its declaratory judgment action (Pet. App. 9a-20a). Based on that ruling, the court dismissed the EEOC's complaint in the Title VII action for failure to state a claim upon which relief could be granted (Pet. App. 21a). Relying on *General Electric Co.* v. *Gilbert, supra,* the court held that petitioner's restriction on coverage for a spouse's pregnancy-related expenses "does not constitute gender-based discrimination" on its face and was not shown to have "caused any gender-based effect" in violation of Title VII (Pet. App. 16a-17a). The court recognized that the PDA was enacted in response to *Gilbert*'s holding that pregnancy classifications are not sex-based classifications, but concluded that the Act merely "carve[d] out a narrow exception" to *Gilbert,* which applied only to claims of pregnancy discrimination submitted by women

employees or applicants for employment (Pet. App. 14a-16a).

A divided panel of the court of appeals, having consolidated the cases, reversed. The panel rejected the district court's view that the PDA's clarification of Title VII's definition of sex discrimination applied only to claims of female employees. Analyzing the PDA's language, the panel explained (Pet. App. 5a-6a; emphasis in original):

> The first clause of the subsection provides that the terms "because of sex" and "on the basis of sex" include because of, or on the basis of, pregnancy, childbirth and related medical conditions. By statutory definition those disabilities are within the meaning of the word "sex." There is nothing to suggest that the definition will vary depending upon the employment status of the pregnant woman. The second clause reads quite harmoniously with the first, since coverage of spouses is employment-related and the statutory reference to the receipt of fringe benefits contains no intimation that benefits payable with respect to the disability of a spouse are excluded from the statute's reach. The statutory reference to "ability or inability to work" denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says "as other persons not so affected," it does not say "as other *employees* not so affected."

Turning to legislative history, the panel noted that two senators, Bayh and Cranston, specifically stated that Title VII, as amended by the PDA, would require complete coverage for employees' wives, including pregnancy-related coverage, where complete coverage is provided for husbands of women workers (Pet. App. 6a). Recognizing that the Senate Committee may have "thought the question an open one," the panel found that fact to provide

"no platform for the company's contention that the question should be resolved upon a consideration of the reach of Title VII prior to enactment of the Pregnancy Discrimination Act" (Pet. App. 7a), *i.e.*, under the principles of *General Electric Co.* v. *Gilbert*, *supra*. Rather, the panel stated, "[u]pon enactment, the new subsection became an integral part of Title VII" and it established, for the purpose of subsequent litigation, that all "[d]istinctions based on pregnancy • • • are distinctions based on sex" (Pet. App. 7a). The panel concluded (*ibid.*):

> Since the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute.

On rehearing en banc, a majority of the court upheld the panel's ruling for the reasons set forth in the panel's opinion (Pet. App. 1a).

SUMMARY OF ARGUMENT

The Pregnancy Discrimination Act of 1978 added one paragraph to Title VII's "Definitions" section in order to clarify that the statute's terms "because of sex" or "on the basis of sex" include because of or on the basis of pregnancy. In the courts below, the litigation turned on whether that definition applies only to claims of pregnancy-based discrimination against women workers, or whether it applies across-the-board to the analysis of all Title VII claims involving pregnancy. If applied across-the-board, the PDA, operating in conjunction with substantive Title VII principles that prohibit discrimination against men as well as women in the fringe benefits of employment, clearly renders petitioner's restrictions on spousal pregnancy coverage unlawful.

Across-the-board application of the PDA is supported by the plain language of the Act, which clarifies the definition of sex discrimination throughout Title VII, and specifically requires that all "women affected by pregnancy" shall be treated the same "for all employment-related purposes" as other similarly disabled persons. The legislative history confirms that Congress intended in the PDA to overrule entirely, for Title VII purposes, this Court's ruling in *General Electric Co.* v. *Gilbert, supra,* that distinctions based on pregnancy are not on their face based on sex, and to ban any pregnancy-based distinctions between employees. While the Senate report on the bill that became the PDA noted that its effect on benefit plans for dependents that exclude pregnancy benefits was an open question to be decided under basic Title VII principles, that reservation implies congressional recognition that such plans would be improper if they discriminated on the basis of the employee's sex—as they do when benefits for spousal pregnancies are denied. Two sponsors of the bill expressly so stated in the debate immediately preceding passage of the PDA, and the cost estimates upon which Congress acted assumed that employer health benefit plans for dependents would be affected. Moreover, to read the PDA as providing protection only for female employees who are disabled by pregnancies would be to single them out for special benefits, inconsistently with Title VII's basic purpose of providing equal treatment for all employees, regardless of sex. Finally, the contemporaneous interpretation of the EEOC, communicated to Congress before the enactment of the PDA, is the one we urge here—that restrictions on spousal pregnancy coverage are unlawful under Title VII as amended by the PDA. That interpretation, to which the Commission has consistently adhered, is entitled to substantial deference.

ARGUMENT

I. TITLE VII PROHIBITS EMPLOYERS FROM DISCRIMINATING AGAINST MALES IN PROVIDING SPOUSAL MEDICAL BENEFITS

It is well-settled that Title VII forbids discrimination in fringe benefits against male as well as female employees.[4] It is equally clear that insurance coverage for employees' spouses is a fringe benefit of employment that is protected by Title VII. *Wambheim* v. *J. C. Penney Co.*, 642 F.2d 362 (9th Cir. 1981) (health insurance plan); *Los Angeles Dep't of Water and Power* v. *Manhart*, 435 U.S. 702, 709 n.14 (1978) (retirement, disability, and death insurance benefit plan including spousal benefits).[5] Thus, a health

[4] See, *e.g.*, *EEOC* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978) (life insurance benefits); *Fitzpatrick* v. *Bitzer*, 519 F.2d 559 (2d Cir. 1975), rev'd for failure to award back pay, 427 U.S. 445 (1976) (retirement benefits). *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976) (same); *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (same). Cf. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976) (white employee may allege race discrimination); *Faraca* v. *Clements*, 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975) (white male may claim race discrimination when employment was denied because wife was black).

[5] This Court has repeatedly held that federal statutes that provide less generous benefits to spouses of female wage earners than to spouses of male wage earners discriminate against the female wage earner on the basis of sex in violation of equal protection rights secured by the Due Process Clause of the Fifth Amendment. *Califano* v. *Goldfarb*, 430 U.S. 199, 207-208 (1977) (invalidating requirement applied solely to female wage earners that wage earner's widower prove he was receiving at least one-half support from his wife when she died to be eligible for survivor's benefits); *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 646-647 (1974) (survivor's benefits formerly available solely to male wage earner's survivors required for widower with minor children); *Frontiero* v. *Richardson*, 411 U.S. 677, 688-691 (1973) (female member of

insurance plan provided by an employer for his workers and their families that limits the spousal coverage available to male employees, because of their sex, is unlawful under Title VII. Such a plan forces a male employee, unlike his female counterpart, to finance himself some of the expenses resulting from his spouse's disabilities. The man is thereby provided less compensation than his female coworker. This practice on its face violates Section 703 (a)(1) of the Act, 42 U.S.C. 2000e-2(a)(1), which forbids an employer to discriminate against any individual with respect to his "compensation, terms, conditions or privileges of employment, because of such individual's • • • sex."[6]

A plan that extends full coverage for employees' husbands but that limits coverage for employees' wives has the same effect. A distinction based explicitly on the sex

---

uniformed services need not prove spouse is dependent to obtain increased quarters allowance and medical and dental benefits since male member not subjected to this requirement). Cf. *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 147 (1980) (state statute requiring widower, but not widow, to prove dependence for entitlement to death benefits violates Fourteenth Amendment). In these spousal benefits cases, as in Title VII, the revelant comparison is between the female and male wage earner, since it is to the wage earner that the benefits flow.

[6] The Commission has always taken the position that it is an unlawful employment practice for a company to provide a health insurance plan that differs in coverage of dependents based on the sex of an employee. See Guidelines On Discrimination Because of Sex, 29 C.F.R. 1604.9(d); Commission Decision No. 70-510, 1973 E.E.O.C. Dec. (CCH) ¶ 6132 (Feb. 4, 1970) (health insurance); Commission Decision No. 70-513, 1973 E.E.O.C. Dec. (CCH) ¶ 6114 (Feb. 4, 1970) (death benefits); Commission Decision No. 70-660, 1973 E.E.O.C. Dec. (CCH) ¶ 6133 (Mar. 24, 1970) (health insurance); Commission Decision No. 71-1100, 1973 E.E.O.C. Dec. (CCH) ¶ 6197 (Dec. 31, 1970) (group insurance).

of a spouse necessarily discriminates among employees on the basis of sex, since the spouse's sex defines the employee's sex.

Petitioner's plan does not deny full coverage to empoyees' wives expressly because they are women. However, because it restricts coverage on the basis of a spouse's pregnancy, it is no more lawful than a plan that restricts coverage on the basis of a spouse's sex if, as we submit and the court of appeals held, the PDA establishes the general principle that pregnancy-based distinctions are sex-based distinctions.[7]

II. THE PDA APPLIES TO ALL TITLE VII CLAIMS INVOLVING PREGNANCY

The language and structure of the PDA, as well as its legislative history and the purposes and policies of Title

---

[7] Petitioner incorrectly claims that the court held its plan unlawful based on the PDA alone (Pet. Br. 11 n.14), and rendered it "unlawful for an employer's medical insurance plan to make *any* distinctions, based on pregnancy, childbirth, or related medical conditions, even distinctions which impact only on non-employees" (Pet. Br. 9; emphasis in original). After holding that the PDA establishes that pregnancy distinctions are sex-based for all Title VII purposes, the court struck down petitioner's plan because its pregnancy distinction discriminated between male and female employees in the receipt of spousal insurance coverage, a fringe benefit (Pet. App. 6a-7a). While the scope of the PDA's definition was the critical issue, the basis of liability was the discrimination that the pregnancy rule effectuated in violation of Title VII. A distinction based on a non-employee's pregnancy that does not result in discrimination between male and female employees—*e.g.*, a limitation or exclusion of medical coverage for the pregnancies of all employees' children—obviously does not violate Title VII. See 29 C.F.R. 1604 app., at 140 (Question and Answer 21); 44 Fed. Reg. 23804-23805 (1979) (Supplementary Information). Although the court of appeals did not address that issue, nothing in its opinion suggests that it would disagree.

VII, fully support the construction of the Act adopted by the court of appeals. That construction is, moreover, in accord with the contemporaneous interpretation of the Act by the agency responsible for its enforcement.

A. The Plain Language Of The Statute Applies To All Title VII Claims Involving Pregnancy

Section 1 of the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, clarified the definition of sex discrimination by adding the following Subsection to Section 701, the general "Definitions" section of Title VII:[8]

> (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. • • •

The first clause of Section 701(k), by its terms, provides the standard to be applied whenever any issue arises under Title VII involving pregnancy: discrimination "because of pregnancy, childbirth, or related medical conditions" is discrimination " 'because of sex.' " As Senator Harrison Williams explained when introducing the Senate bill (S. 995, 95th Cong., 2d Sess. (1978)), which ultimately become the PDA, the legislation "explicitly provide[s] that the term 'sex discrimination' within the

[8] It is significant that Section 701 provides definitions "for purposes of this Title," not simply for some sections of the Act.

meaning of the act includes discrimination based on 'pregnancy, childbirth or related medical conditions.' " 123 Cong. Rec. 7540 (1977), *reprinted in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978, at 3 (Comm. Print 1980) (hereinafter, "Leg. Hist."). This broad statement of principle plainly indicates that all discrimination among employees resulting from the different treatment of pregnancy-related conditions is sex discrimination prohibited by Title VII.[9]

[9] Petitioner attempts to avoid the clear import of the first clause of the new definition by suggesting (Pet. Br. 10-11) that it means only that the substantive portions of Title VII should be read to include the new terms, and thus that Section 703(a) prohibits only discrimination against any individual "because of such individual's" pregnancy, childbirth or related conditions. But, of course, that is not the statute Congress enacted. Instead of simply amending Section 703(a) as petitioner suggests, it amended the general definition section, so that the term "sex discrimination" includes discrimination based on pregnancy, regardless of the particular phraseology in which the ban on sex discrimination is phrased in the substantive sections.

Petitioner's reading of the PDA would lead to anomalous and absurd results. Section 717 of Title VII, 42 U.S.C. (& Supp. IV) 2000e-16, provides that "[a]ll personnel actions affecting employees or applicants for employment [in the federal government service] • • • shall be made free of any discrimination based on race, color, religion, sex, or national origin", while Section 703, 42 U.S.C. 2000e-2, provides that private employers may not discriminate against any individual because of such individual's "race, color, religion, sex or national origin". Thus, under petitioner's mechanistic approach to the statute, private employers may treat pregnancy in a way which disadvantages male employees, while the federal government may not. There is absolutely no indication that Congress intended any such distinction. Cf. *Chandler* v. *Roudebush*, 425 U.S. 840 (1976).

The second clause of the PDA explains the effect of the first clause: it states that "women affected by pregnancy • • • shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work • • •." This clause makes clear that under Title VII "women affected by pregnancy" shall not be treated differently from other persons covered in benefit plans including, of course, health insurance benefit plans of the sort involved here.[10] It does not refer to pregnancies of *employees,* or otherwise suggest that pregnant spouses are not "women affected by pregnancy." As the court of appeals observed (Pet. App. 5a-6a), the requirement in the second clause that such women be treated like other persons not so affected but "similar in their ability or inability to work" means that pregnancy, to the extent it creates a disability, is to be treated as are all other disabilities that "persons" may suffer.[11] It thus effectuates Congress's intent to overrule the underlying rationale of *Gilbert* "that employers may treat pregnancy and its incidents as *sui generis* without regard to its functional comparability to other conditions." S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977). Neither literally nor conceptually does this phrase require that the woman whose pregnancy occasions the claim for medical expenses under a health insurance plan herself work for the employer under whose plan the claim is made, or for any employer.[12]

---

[10] Significantly, the next sentence of the paragraph refers expressly to health insurance benefits, so congressional attention was evidently focused on the impact of the amendment on such plans.

[11] It also means that to the extent pregnancy does not disable, pregnant women are to be treated like other able persons.

[12] The argument that comparison to "ability or inability to work" in the second clause limits the PDA's scope to claims of

Even if, as petitioner argues (Pet. Br. 19-20), the second clause were read as applying only to women employees, it would hardly follow that the clause restricts the Act's definition to claims of women workers. The Committee Reports and sponsor's statements upon which petitioner relies (Pet. Br. 16, 19-20) unequivocally state that the Act first broadens Title VII's definition of sex discrimination to subsume pregnancy discrimination, and then "also makes clear" or "specifically • • • define[s]" what treatment of pregnant women workers is mandated by that definitional amendment. Thus, the second clause at best applies the PDA's definition in a particular set of circumstances; it cannot be read to limit its application to those circumstances.[13]

To read the second clause as limiting the Act's scope, moreover, contravenes the well-established rule that statutes must be interpreted to give effect, where possible, to

---

female workers resembles the argument rejected by this Court in *McDonald* v. *Santa Fe Trail Transportation Co., supra.* The Court there held that 42 U.S.C. 1981 protects whites against racial discrimination because the statute's comparison to rights "enjoyed by white citizens" simply "emphasiz[ed] the 'racial character of the rights being protected' " and did not restrict the statute's protection to non-whites. 427 U.S. at 827. Here, the comparison emphasizes the functional basis of the conditions to be covered. See S. Rep. No. 95-331, *supra,* at 4.

[13] We note that the second clause of the PDA is joined to the first by the conjunction "and," a word which "is always employed to express the relation of addition." *Montello Salt Co.* v. *Utah,* 221 U.S. 452, 466 (1911). Thus, the second clause, grammatically, forms a conjunctive proposition and not a conditional proposition that limits or subtracts from the first. Although no court should "review congressional enactments as a panel of grammarians • • • neither [should it] regard ordinary principles of English prose as irrelevant to a construction of those enactments." *Flora* v. *United States,* 362 U.S. 145, 150 (1960).

every word Congress used. See, *e.g.*., *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). If, as petitioner contends, the PDA was enacted only to protect women employees from pregnancy-based discrimination, the first clause is inoperative because the second alone completely effectuates that intent. Under petitioner's interpretation the second clause comprehensively prohibits discrimination against pregnant women workers, by requiring that they be treated in all phases of employment the same as other persons similarly-situated with respect to their ability or inability to work. Thus, the first clause is mere surplusage. In order to give effect to the PDA's language in its entirety, petitioner's construction of the statute must be rejected.[14]

B. The Legislative Histroy Confirms The Plain Meaning of the PDA

1. A primary impetus behind the enactment of the PDA was to protect women employees from the consequences of the decision in *General Electric Co.* v. *Gilbert, supra,* as the congressional statements cited by petitioner attest (Pet. Br. 14-19). However, the fact that Congress expresssed a special concern for "working women" cannot, standing alone, support an interpretation of the new definition added by the PDA that conflicts with the established principle that both women and men are protected by Title VII. Such expressions are similar to the numerous statements in previous Title VII legislative history that voice

[14] Petitioner asserts that each clause of the Act was designed to overrule, for the benefit of women workers, each of two purported "holdings" of *Gilbert, i.e.*, that pregnancy discrimination against female employees is not gender-based, and that Title VII does not require employers to pay the extra cost of covering pregnancy under fringe benefit programs (Pet. Br. 29-30). Even if petitioner has accurately summarized *Gilbert* (and we think it has not), those two holdings are effectively overruled by the second clause alone.

concern over the protection of "blacks," "minorities," and "women"; those statements are not to be read as establishing that whites and men are not protected by Title VII. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).[15]

Moreover, to interpret the PDA as amending Title VII's definition of sex discrimination only for the benefit of women workers would overlook the fact that Congress rejected not only the narrow holding, but also the rationale, of *Gilbert,* and intended in the new Act simply to assure that Title VII would bar discrimination on the basis of pregnancy, just like any other sex-based discrimination. Although Congress clearly intended to require non-discriminatory treatment of women employees, it certainly did not intend to require discrimination in their favor, as petitioner's reading of the PDA suggests.

The legislative history of the PDA makes clear that Congress's purpose in enacting the statute was to overrule entirely, for purposes of Title VII, the rationale of this Court in *General Electric Co.* v. *Gilbert, supra,* 429 U.S. at 136, that "pregnancy • • • is not gender-based • • • at all", and to adopt instead the analysis of the dissenters in that case. As the Senate Report states (S. Rep. No. 95-331, *supra,* at 2-3; Leg. Hist. 39-40):[16]

[15] Nor does the absence of extensive congressional debate on the subject of dependent coverage support an interpretation that restricts the language of the PDA which, by its terms, reaches discrimination on the basis of dependent spouses' pregnancies. Congress often fails to debate all aspects of legislation fully, as this Court has noted wtih respect to Title VII. See *General Electric Co.* v. *Gilbert, supra,* 429 U.S. at 136 (Title VII's legislative history on sex discrimination is "notable primarily for its brevity."); *County of Washington* v. *Gunther,* 452 U.S. 161 (1981).

[16] Similarly, the House Report (H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 23 (1978); Leg. Hist. 148-149) states:

In the committee's view, the following passage from the two dissenting opinions in [*General Electric Co.* v. *Gilbert*] correctly express both the principle and the meaning of Title VII. As Mr. Justice Brennan stated: "Surely it offends commonsense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related'." Likewise, Mr. Justice Stevens stated that, "(b)y definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."

Thus, S. 995 was introduced to change the definition of sex discrimination in Title VII to reflect the "commonsense" view and to insure that working women are protected against all forms of employment discrimination based on sex.

• • • • •

This bill is intended to make plain that, under title VII of the Civil Rights Act of 1964, discrimination

---

Justice Brennan, in a dissenting opinion • • • pointed out that since the [*General Electric*] plan included comprehensive coverage for males, and failed to provide comprehensive coverage for females, the majority erred in finding that the exclusion of pregnancy disability coverage was a non-discriminatory policy. Furthermore, Justice Stevens, in his dissenting opinion, argued that "it is the capacity to become pregnant which primarily differentiates the female from the male."

It is the committee's view that the dissenting Justices correctly interpreted the Act.

• • • • •

H.R. 6075 was introduced to change the defnition of sex discrimination in Title VII to reflect the commonsense view and to ensure that working women are protected against all forms of employment discrimination based on sex.

based on pregnancy, childbirth and related medical conditions is discrimination based on sex.

It is manifest throughout the history of the amendment that Congress disagreed with, and intended to overturn, the entire rationale of *Gilbert*.[17] For example, in introducing the Senate bill, Senator Williams emphatically took issue with the *Gilbert* decision, explaining that "when an employer's plan provides protection in the event of virtually every conceivable disability but one, and that one can affect only women, it is an inescapable conclusion that such a plan by definition discriminates on the basis of sex". 123 Cong. Rec. 7539 (1977); Leg. Hist. 1-2. Congressman Hawkins, introducing H.R. 5055, agreed:

> This view [in *Gilbert*]—that a classification which harms only women and does so on the basis of a factor inextricably linked to gender is not discrimination against women just because not all women are affected—is contrary to any sensible approach to what constitutes discrimination. For, as Justice Stephens [sic] noted in his dissent in *Gilbert*.
>
> It is the capacity to become pregnant which primarily distinguishes the female from the male, so that

---

[17] Thus, the Senate Report states:

> [T]he bill rejects the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability to other conditions.

S. Rep. No. 95-331, *supra*, at 4; Leg. Hist. 41. Similarly, Senator Javits—the ranking Republican member of the committee which considered S. 995, the bill which became the PDA—explained that pregnancy should not be treated as unique, stating:

> We do not want pregnancy discriminated against, as contrasted with a broken leg or a strep throat or appendicitis or some other basis for disability.

123 Cong. Rec. 29654 (1977); Leg. Hist. 106.

> a rule which treats pregnancy as unique by definition • • • discriminates on account of sex.
>
> • • • • •
>
> Therefore, H.R. 5055 is designed to make clear that • • • this Congress does regard discrimination based on pregnancy as discrimination based on sex and, in particular, that employers • • • must treat pregnant women as they treat other employees similar in their ability or inability to work.

123 Cong. Rec. 10582 (1977); Leg. Hist. 24.[18]

Despite this clear evidence that the PDA reflects congressional rejection of the rationale of *Gilbert*, petitioner asks this Court to apply the *Gilbert* analysis here and even argues that *Gilbert* "establishes the only pertinent 'Title VII principles'" for application to this case (Pet. Br. 37).[19] More accurately, the *Gilbert* dissents, which were

---

[18] See also, *e.g.*, the remarks of Senator Mathias, 123 Cong. Rec. 7541 (1977); Leg. Hist. 8 ("the Supreme Court has seen things differently. • • • Now the ball is back in the Congress' court. And, we have an opportunity • • • to amend Title VII to make clear that sex discrimination includes classifications based on pregnancy. The legislation which we now introduce, will achieve that goal."); remarks of Senator Javits, 123 Cong. Rec. 29387 (1977); Leg. Hist. 67 ("This principle, that discrimination against pregnant women is sex discrimination, is the substance of S. 995. As Mr. Justice Stevens stated: '(b)y definition, such a rule discriminates on account of sex'"); remarks of Senator Bayh, 123 Cong. Rec. 29641 (1977); Leg. Hist. 73 (bill made necessary by *Gilbert*, in which "broad exclusion of pregnancy discrimination under Title VII holds many unfortunate implications for other related issues"); remarks of Mr. Sarasin, 124 Cong. Rec. 21436 (1978); Leg. Hist. 168 (endorses Justice Stevens' dissent).

[19] Indeed, petitioner's arguments that rely on *Gilbert* (and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), which follows *Gilbert*) to show that its plan has no prohibited discriminatory

adopted in the PDA, establish those principles. Petitioner's construction of the PDA as applying only to women employees is wholly at odds with the Act's broad rejection of *Gilbert*. Petitioner asks this Court to hold that Congress in the PDA provided that an employee's pregnancy is sex-based, while a spouse's pregnancy is gender-neutral —a result hardly consistent with the "commonsense view" expressly endorsed by Congress.[20]

Moreover, it is entirely clear that Congress did not intend, in enacting the PDA, to require any special preferential treatment for female employees. Instead, the PDA was designed to adopt the *Gilbert* dissenters' view of the scope of Title VII, and simply to require implementation of that Title's anti-discrimination principles within that newly clarified scope. See, *e.g.*, S. Rep. No. 95-331, *supra*, at 4, Leg. Hist. 41 ("Basic to all • • • applications is that the bill, because it would operate as part of Title VII, prohibits only discriminatory treatment"); H.R. Rep. No. 95-948, *supra*, at 4; Leg. Hist. 150 ("It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment"); 123 Cong. Rec. 10582 (1977); Leg. Hist. 25 (remarks of Rep. Hawkins) ("It is also important to understand what this bill would not do. Like Title VII generally, it merely requires

---

effect (Pet. Br. 41-49) are beside the point because the PDA establishes that the denial of spousal benefits here violates Title VII on its face. The Court in *Gilbert* considered the effects of the pregnancy exclusion there only after it had concluded that a distinction based on pregnancy did not on its face violate Title VII. When Congress rejected that conclusion, it rendered unnecessary the consideration of the effects of pregnancy distinctions.

[20] Petitioner's argument also adopts precisely the *"sui generis"* treatment of pregnancy that Congress rejected (see p. 19 n.17, *supra*); it would allow employers to single out pregnancy as the one spousal condition for which health benefits are limited.

that employers not discriminate''). Petitioner's claim that the PDA is a special protective statute for women employees (Pet. Br. 30-31) ignores this clear evidence of Congress's contrary intent.

2. Nor does our contention rest solely on general expressions of the congressional intent to reject *Gilbert* and require that pregnancy-related disabilities be treated like any other non-work related disability. The Senate Report on S. 995, the bill that became the PDA, strongly implied that spousal pregnancy costs were to be treated like other disabilities, and both sponsors and opponents of that bill—and the EEOC itself—specifically informed Congress that Title VII as amended by the PDA would require that result. Moreover, the estimates considered by Congress of the PDA's financial impact on medical insurance plans included costs for spousal pregnancy coverage.

The Senate Report notes that although the ''basic'' (not the only) purpose of the PDA is ''to protect women employees'', it was not designed to ''alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore, the question in regard to dependents' benefits would be determined on the basis of existing title VII principles'' S. Rep. No. 95-331, *supra*, at 5-6; Leg. Hist. 42-43. The Report explained those ''existing principles'' to some extent: it noted that they would not require that pregnancies of dependents be treated like employee pregnancies. But it recognized that ''the question of whether an employer who does cover dependents • • • may exclude conditions related to pregnancy from that coverage is a different matter.'' Because the committee was not aware of any litigated cases involving such plans, it noted only that although ''[i]t is certainly not this committee's desire to encourage the institution of such plans'', there was an open question ''[if] such plans should be instituted in the future'' as to ''whether, under title

VII, the affected employees were discriminated against on the basis of their sex as regards the extent of the coverage for their dependents'' (*ibid.*).

The clear congressional rejection of this Court's decision in *Gilbert* as an accurate assessment of Title VII principles (see pages 17-20, *supra*) refutes petitioner's suggestion (Pet. Br. 37) that the reference in the Senate Report to ''existing Title VII principles'' was an invitation to the courts to reaffirm the *Gilbert* analysis of pregnancy as unrelated to sex discrimination, if only in the context of spousal pregnancy.[21] Instead, the courts were to accept the newly clarified ''definition of sex discrimination for Title VII purposes'' and apply it, consistently with accepted Title VII principles, to any case that arose ''in the future''—*i.e.*, after Title VII had been amended by the PDA.

Clearly, the ''existing Title VII principles'' to which the Report refers are the substantive precepts relevant to this issue, viz., that men as well as women are protected under the statute from treatment in the work place which is less favorable than that accorded the opposite sex; that dependent health coverage is a benefit which flows to the wage earner; and that a health insurance plan which limits the extent of dependent coverage because of the sex of the employee is unlawful.

---

[21] If petitioner were correct, the validity of plans of the sort the Report states the committee ''certainly [did] not • • • desire to encourage'' (S. Rep. No. 95-331, *supra*, at 6; Leg. Hist. 43) would be virtually beyond dispute. *Gilbert* held that the exclusion of pregnancy from a benefits program is not sexually discriminatory absent a showing of disparate impact in the actuarial value of the benefit packages available to men and women. Since such a showing could not be made (see Pet. Br. 44-48) any challenge to the exclusion of spousal pregnancy coverage from an employer's insurance plan, as a practical matter, would be doomed to failure under *Gilbert*.

The Report recognized that those principles do not require that dependents be treated like employees.[22] As to the "different matter" of whether an employer plan that covers dependents may exclude the pregnancies of dependents, the answer to the open question reserved by the Report depends on whether the restriction discriminates between male and female employees. Although limitations on spousal pregnancies do so discriminate (see pages 9-10, *supra*), a limitation—applicable to male and female employees alike—on recovery for pregnancies of dependent children would not, and thus would not violate Title VII. See 29 C.F.R. 1604 app., at 140 (Question and Answer 21); 44 Fed. Reg. 23804-23805 (1979) (Supplementary Information).

b. The legislative history explains why the Senate Report expresses doubt about the validity of limitations on pregnancy benefits for dependents. On June 6, 1977, Senator Jacob Javits—the ranking Republican member of the Senate Committee on Human Resources, to which the pregnancy discrimination bill, S. 995, was referred—wrote to the head of EEOC on behalf of the Committee. Senator Javits requested the views of the Administration on the issue of "possible health insurance implications of the bill for maternity and other sex-linked coverages" (J.A. 42-44).

---

[22] Under Title VII "the basic standard is comparability among employees" (S. Rep. No. 95-331, *supra*, at 5; Leg. Hist. 42). Petitioner incorrectly claims that because the Report states that the PDA would not require employers to provide maternity benefits for the spouses of their male employees to the same extent that they provide for their female employees, *Gilbert* controls the spousal benefits issue (Pet. Br. 8, 30-31 & n.37). The Report simply rejected the suggestion that spousal pregnancy coverage would be required "whether or not the employer provided any other coverage for dependents". If Congress had intended the PDA to have no application to the issue of spousal pregnancy benefits, the fact that the employer may otherwise provide dependent coverage would have been irrelevant.

In a letter dated June 28, 1977,[23] and signed by Chairman Eleanor Holmes Norton of the EEOC, Solicitor Carin Clauss of the Department of Labor, and James P. Turner, Acting Assistant Attorney General for Civil Rights of the Department of Justice (J.A. 48-49), the government explained that:

> the additional medical insurance required by the bill for female employees would be required for the wives of male employees • • • only • • • where the employer maintains an otherwise comprehensive health insurance plan covering both employees and their dependents. It would not apply where the employer offers health insurance to employees only. In those circumstances, it would not be necessary to cover the medical costs of a dependent wife's pregnancy.

The Senate Committee issued its Report on S. 995 more than a week after the date of this letter. Surely, if Congress had disagreed with the views expressed therein, it would have stated that the administrative interpretation exceeded the Act's reach. It did not do so.[24]

---

[23] The original reply to Senator Javits' inquiry (J.A. 45-47) could be read as indicating that the proposed bill would require employers to cover the costs of spousal pregnancies whether or not they offered other dependent medical coverage. In contrast, Assistant Attorney General Drew Days had stated in House Hearings on the bill that it would not "reach dependents" (*Legislation to Prohibit Sex Discrimination On the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before The Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 187 (1977) (hereinafter *"House Hearings"*)). The June 28, 1977 letter to Senator Javits obviously represented the final government position on the effect of the bill.

[24] Indeed, the Senate Report citation of "existing Title VII principles" (S. Rep. No. 95-331, *supra*, at 5), may well refer to the analysis contained in the government responses to Senator Javits's inquiry, since those responses referred to "general Title VII principles" to explain the result they reached.

c. Moreover, in debate on the Senate floor, two sponsors of the bill clarified the reference in the Senate Report to "Title VII principles" and their application to the denial of spousal pregnancy benefits.[25] Both Senator Bayh and Senator Cranston expressed the view that under the bill spousal pregnancies could not be excluded from general medical services available to dependents.[26]

---

[25] Statements of the sponsors of legislation are entitled to significant weight. *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 14.

[26] Senator Bayh stated (123 Cong. Rec. 29642 (1977); Leg. Hist. 75):

> There remains the question, however, of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. While it is difficult to second-guess the courts, I feel that the history of sex discrimination cases under the 14th amendment [see p. 9 n.5, *supra*] in addition to previous interpretations of Title VII regulations relating to the treatment of dependents [see p. 10 n.6, *supra*] will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees.

Senator Cranston, stated in the same debate (123 Cong. Rec. 29663 (1977); Leg. Hist. 131):

> When the Human Resources Committee considered how S. 995 would affect medical coverage for dependents of employees, the question was raised about the obligation of an employer to pay for the pregnancy-related medical expenses of spouses of employees. The committee presumed that most comprehensive medical plans do cover dependents, and that it was unlikely that any comprehensive plan covering spouses would cover husbands of women employees but not wives of male employees. Thus, the committee did not directly answer the question of whether such plans would be discriminatory under title VII.

These were the only legislators to address the PDA's application to insurance coverage for pregnant spouses; no one expressed any disagreement with their elaboration on the statement in the Senate Report, or suggested that their remarks were in any way inconsistent with the analysis contained therein.[27] Instead, having heard these state-

---

> Mr. President, I would like to express for the record my own view that such a plan would indeed be discriminatory, and would be prohibited by the title VII sex discrimination ban.

[27] Indeed, Senator Williams—who, petitioner claims, to have made clear that only pregnant workers would be protected by the bill (Pet. Br. 28)—rose immediately after Senator Bayh's remarks without taking issue with his views. 123 Cong. Rec. 29643 (1977); Leg. Hist. 77.

None of Senator Williams's statements quoted by petitioner limit the PDA to claims of women employees. While he stated that the Act would protect, and was necessary to protect, women workers, he nowhere stated that this was its sole purpose (see Pet. Br. 14-15). Petitioner misreads his colloquy with Senator Hatch (Pet. Br. 24-26) and with Allen Lazarescu of the American Council of Life Insurance (ACLI) (Pet. Br. 26) to argue otherwise. Senator Hatch inquired whether the phrase "women affected by pregnancy" included women employees who were not themselves pregnant or dependents of employees. 123 Cong. Rec. 29644 (1977); Leg. Hist. 80. Senator Williams answered, *solely in the context of income maintenance plans*, that the Act applied only to women employees themselves pregnant (*ibid.*). Such plans protect an employee from loss of wages while he is absent from work due to a disability (S. Roberts, *Dictionary of Industrial Relations* 78 (1966)) and thus necessarily apply only to employees. On the other hand, medical benefit or health insurance plans do not replace lost wages but instead reimburse an employee for medical costs related to a disability. *Id.* at 136. Such plans may be provided for employees only, or, as here, for an employee, a spouse, and other dependents. The legislative history of the PDA shows

ments, the Senate later on the same day voted overwhelmingly to pass S. 995.[28]

---

that Congress was well aware of the distinction between disability and medical insurance. See, *e.g.*, the distinctions in both the Senate and House Reports between disability insurance and medical insurance (S. Rep. No. 95-331, *supra*, at 4-5; Leg. Hist. 41-42; H.R. Rep. No. 95-948, *supra*, at 5-6, Leg. Hist. 151-152). Petitioner argued below that to read Senator Williams's response as limited to income maintenance plans rendered it redundant or meaningless because to state that only women employees can receive income maintenance for work absence occasioned by their pregnancies is to state the obvious. This argument ignores the hypothetical posed by Senator Hatch which included whether women employees "affected by" the pregnancies of their daughters or co-workers with whom they car pool fall within the protection of the Act. Senator Williams's answer, that these women would not be entitled to income maintenance unless they themselves were pregnant, is responsive to Senator Hatch's inquiry.

Similarly, Senator Williams's statement that the Act "only deals with women employees," made during his exchange with ACLI representative Allen Lazarescu, occurred after an extended discussion between the two regarding the accuracy of the ACLI's estimate of the PDA's effect on disability benefits (*i.e.*, income maintenance) costs. ***Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources***, 95th Cong., 1st Sess. 397-402 (1977) (hereinafter "***Senate Hearings***"). As the discussion shows, Senator Williams was concerned about whether ACLI's use of women in the work force to estimate those costs was limited to women in "the age groups where conservatively you might expect pregnancy" (*id.* at 402). Senator Williams's remarks were intended merely to determine whether estimates were based on the proper number of women in the work force so as to insure that estimates of disability coverage were not inflated, rather than to limit coverage of medical insurance benefits.

[28] Petitioner's suggestion (Pet. Br. 26) that these views were "idiosyncratic (and erroneous) view[s] of Title VII law prior to

d. The opponents of the legislation agreed that employers who provided insurance coverage for spouses would be required to cover pregnancy as well. This view was expressed during the hearings by Richard Minck, Vice President and Actuary of the American Council of Life Insurance (ACLI), who stated (*House Hearings, supra*, at 120-121):

> The bill is drafted not in terms that you treat your male employees the same as your female employees, but in terms of saying that you make the same treatment for pregnancy that you do for any other disability.
>
> So that would mean whether the pregnancy involves the wife of a male employee, or a female employee, you would have to provide the same medical benefits on the same terms that you do for pneumonia.
>
> • • • • •
>
> You could not have a $500 flat benefit.

No Congressman at the hearing disagreed. This uncontradicted interpretation of the bill's scope is thus useful evidence of congressional intent. *Arizona* v. *California*, 373 U.S. 546, 582-583 and n.85 (1963).

e. The Congress considered several estimates of the effects to be anticipated from the PDA on the costs to em-

---

passage of the PDA" is accordingly unavailing. The Senators were, in effect, answering the questions raised in the Senate Report. Having heard their answers, the Senate passed the bill. It accordingly makes little difference whether the views when expressed were "idiosyncratic" or even correct—the crucial point is that the subsequent congressional action ratified them. See *Brown* v. *GSA*, 425 U.S. 820, 828 (1976). In any event, the explanations given of the effect of the PDA on established Title VII principles, and the conclusions as to the validity of exclusion of benefits for spousal pregnancy, were correct (see pp. 11-16, *supra*).

ployers of medical insurance plans. All of these estimates assumed that enactment of the PDA would affect the cost of pregnancy coverage for dependents of employees.

In response to requests from Congressman Hawkins and Senator Williams (see *House Hearings, supra,* at 180; *Senate Hearings, supra,* at 556), the Department of Labor prepared a report on the PDA's ramifications for employers' insurance costs. The Department's report stated (footnote omitted):

> The costs of private sector health insurance will also be affected by H.R. 6075. However, precise data on the cost impact of the bill with respect to health insurance plans could not be estimated reliably. Published data from the Social Security Administration with information on dependents' health care coverage are only available through 1970. Thus, this coverage would have to be extrapolated to 1976 with • • • significant further adjustments to assess costs for dependents • • •.

Senate Hearings, supra, at 563-564; *House Hearings, supra,* at 182.

The American Council of Life Insurance, in opposition to the bill, also submitted a report estimating that the PDA would increase health insurance costs by $1.1 billion. That figure was based on the number of women in the child-bearing population, not simply on the number of women employees of child-bearing age (the figure that report used to estimate increased *disability* insurance costs). The ACLI report extrapolated its national estimate from the cost experience in New York State, where the state insurance law was amended in 1976 to require that all group and individual health insurance policies provide coverage for maternity care of the insured and the insured's dependents to the same extent as coverage for

other illnesses or diseases.[29] See *Senate Hearings, supra,* at 399, 402, 424, 425-426, 431; *House Hearings, supra,* at 94, 96, 98-99, 104.[30]

Congress's discussion of these two reports is illuminating. Although the Senate Committee Report discredited the ACLI's $1.1 billion figure as "demonstrably too high" (S. Rep. No. 95-331, *supra,* at 9, Leg. Hist. 46), it did not suggest that estimates based on the New York law inappropriately included the costs of dependent maternity coverage. Instead, the Senate Report faulted the estimate only because it was "apparently based upon the assumption that this legislation would require medical and hospital insurance coverage for maternity under all plans administered by insurance companies" (*ibid.*). The Report countered that, in fact, "[t]his legislation does not require that hospital medical insurance benefits be provided

---

[29] See N.Y. Ins. Law §§ 162-a, 164a (McKinney Supp. 1982); 1976 N.Y. Laws, ch. 843 §§ 1, 2.

[30] The ACLI estimates were presented and discussed during debate on the bill by the entire Senate (124 Cong. Rec. 29650-29652 (1978); Leg. Hist. 98-102). Petitioner is therefore incorrect in asserting that "even opponents of the Act • • • did not include the enormous costs of dependents' coverage in their estimates" (Pet. Br. 23 n.33). Moreover, of the three witness statements cited by petitioner in support of this proposition, two addressed only the increased costs for providing *disability benefits* for pregnancy which, of course, are simply not available to dependents (see p. 28 n.27, *supra*). Similarly, in asserting that "[t]he cost of covering pregnant employees, not the cost of covering pregnant wives of male employees, was the focus of all debate and discussion on the economic effects of the Act", petitioner cites ten statements of witnesses at the congressional hearings, all of whom addressed only the cost of providing *disability benefits* for pregnancy (Pet. Br. 23 n.32). This cost "debate and discussion" could not have delimited the scope of the PDA, or even women employees would not be entitled to medical coverage for their pregnancies under Title VII as amended.

for maternity, it merely requires that where hospital medical benefits are provided they must be provided on a nondiscriminatory basis'' (*ibid.*).[31] The Report then also noted that the cost of the PDA ''would not include the provision of hospital medical benefits for maternity in States, like New York, where insurance for maternity is mandatory under State law,'' nor would it include ''adjustments to provide nondiscriminatory coverage of medical conditions related to pregnancy [in 25 states] where nondiscrimination is already mandated by State law.'' *Id.* at 10; Leg. Hist. 47; see also H.R. Rep. No. 95-948, *supra,* at 10; Leg. Hist. 156.[32]

---

[31] The Report observed that ''[a]ccurate calculation of the cost of correcting discriminatory plans would require detailed information about the number of women covered by employment-related medical plans which are discriminatory'' and the degree to which those plans discriminate. S. Rep. No. 95-331, *supra,* at 9-10; Leg. Hist. 46-47. In a footnote, the Report referred to the Department of Labor's 1 *Digest of Health and Insurance Plans* (1974) as indicating that of 148 representative health plans summarized, 59% appeared to provide nondiscriminatory maternity coverage while 41% appeared to be discriminatory. *Id.* at 10 n.1; Leg. Hist. 47 n.1. All of the health benefits described in those plans—including maternity benefits—were applicable to employees and their dependent spouses and children. *Digest of Health and Insurance Plans, supra,* at IX (and summaries of individual plans).

[32] Petitioner wrongly asserts that the ''mandatory maternity coverage'' in New York to which the Senate Report referred was a product of the state court decision in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board,* 41 N.Y. 2d 84, 359 N.E. 2d 393, 390 N.Y.S. 2d 884 (1976) and the state's Workers' Compensation Law, neither of which ''required employers providing spousal medical benefits to insure against spousal pregnancies'' (Pet. Br. 22). As we have shown, the New York insurance law cited in the Report (S. Rep. No. 95-331, *supra,* at 9; Leg. Hist. 46) and by the ACLI (see S. Rep. No. 95-331, *supra,* at 27) does require coverage for spousal pregnancy on the same terms as coverage for any other illness or injury. Other states had similar laws. See Gillooly, *The Irrational Trend Towards Mandatory Maternity Coverage,* 26 Drake L. Rev. 758, 764-765 (1976) (collecting statutes).

The Senate Report then specifically addressed the Department of Labor's report, and agreed with its conclusion that no accurate estimate of the bill's impact on medical insurance costs was possible. Significantly, neither the Senate nor the House took issue with Labor's position that any such estimate would have to include ''adjustments to

---

Although the Senate Report cited *Brooklyn Gas* when it referred to New York as one of the 25 states in which the PDA would impose no substantial additional medical insurance costs, petitioner's argument (Pet. Br. 22) that this reference shows Congress did not intend the PDA to affect dependent pregnancy coverage, because *Brooklyn Gas* dealt only with women employees, is spurious. The issue in *Brooklyn Gas* was whether the denial of disability benefits and sick leave to pregnant women workers violated the state's prohibition against sex discrimination. In finding such a violation, the court merely reaffirmed its previous rulings that pregnancy discrimination is sex discrimination. See, *e.g., Union Free School District No. 6* v. *New York State Human Rights Appeal Board,* 35 N.Y. 2d 371, 320 N.E. 2d 859 (1974). The rationale of *Brooklyn Gas* thus mandates non-discriminatory medical coverage of pregnancy, regardless of whether the pregnancy is that of a woman employee or a male employee's spouse. The same is true of the Wisconsin and Pennsylania state court decisions cited by petitioner (Pet. Br. 22 n.31): *Anderson* v. *Upper Bucks County Area Vocational Technical School,* 30 Pa. Commw. 103, 373 A.2d 126 (1977) (denial of sick leave to pregnant employees is unlawful under state law banning sex discrimination because ''pregnancy-based discrimination constitutes sex discrimination''); *Ray-O-Vac* v. *Dep't of Industry, Labor & Human Relations,* 70 Wis. 2d 919, 236 N.W. 2d 209 (1975) (''Pregnancy is undeniably a sex-related characteristic'', so limitation on disability benefits for pregnant employees is unlawful under state law banning sex discrimination).

assess costs for dependents'' (p. 31, *supra*). S. Rep. No. 95-331, *supra,* at 10; Leg. Hist. 47; H.R. Rep. No. 95-948, *supra,* at 10; Leg. Hist. 156.[33]

3. Even if the legislative history were less clear than it is, this Court should be reluctant to adopt petitioner's interpretation that the PDA was intended to provide a special benefit for working women. As the most comprehensive federal fair employment statute ever enacted, Title VII invests in all workers, men as well as women, the right to be free of discriminatory treatment in the work place. It prohibits the employment of men, as well as women, under terms and conditions less favorable than those accorded similarly-situated members of the opposite sex and, conversely, forbids preferential treatment of women as well as men on the basis of their sex. Petitioner's position,

---

[33] Petitioner's characterization of the additional medical insurance costs for covering spousal pregnancy as ''staggering'' (Pet. Br. 23), thus is not supported by any congressional finding. It is also wholly without record support in this case. We do not, of course, contend that the cost of non-discriminatory coverage for spousal pregnancy is de minimis. However, as Congressman Hawkins stated in the debate on the PDA, 123 Cong. Rec. 10583 (1977); Leg. Hist. 26:

> The main argument raised against prohibiting pregnancy-related discrimination is that it will be costly. But eradicating invidious discrimination by definition costs money: It is cheaper to pay all black workers less than all white workers, or all women less than all men. The fact that it would cost employers money did not prevent Congress from enacting the Equal Pay Act or title VII, and it should not prevent this Congress from making clear that title VII prohibits this form of sex discrimination as well.

And, of course, employers are now free to adjust the benefits or contributions associated with their medical insurance plans in a non-discriminatory fashion. See Section 3 of the Act, Pub. L. No. 95-555, 92 Stat. 2076 (Pet. App. 51a).

that the PDA amendment of Title VII's definition of sex discrimination applies only to claims of women workers, would distort the fundamental anti-discrimination principles upon which Title VII is founded.

As this case demonstrates, men as well as women workers may be disadvantaged by employers' policies or programs that treat pregnancy less favorably than other medical conditions or disabilities. Under petitioner's view, the PDA extends protection from such pregnancy-based discrimination to women employees while withholding the same protection from their male colleagues. It is most unlikely that Congress, in a simple definitional amendment to Title VII, would have mandated this special, preferential treatment which is contrary to the basic principles of the underlying law. Indeed, given the inconsistency of such a requirement with the underlying purpose of Title VII, it would be appropriate for a court to require a clear statement in the statute itself of any such purpose, or, at the very least, unambiguous legislative history explaining the legislative intent to create an exception to the basic statutory purpose. *County of Washington* v. *Gunther,* 452 U.S. 161, 178 (1981). No such explanation exists here. Instead, as we have shown, the legislative history clearly indicates that the clarified definition is to be read harmoniously with the basic principles of Title VII, and indeed that Congress anticipated that an employer's plan providing medical benefits to dependents would not treat spousal pregnancies less generously than other disabilities.

III. THE CONTEMPORANEOUS ADMINISTRATIVE INTERPRETATION OF THE PDA IS ENTITLED TO SUBSTANTIAL JUDICIAL DEFERENCE

The EEOC is the agency charged by Congress with the interpretation and administration of the PDA. Its contemporaneous construction of the Act's impact on Title VII with respect to the provision of medical insurance cov-

erage for spousal pregnancy is set forth in the Appendix to its interpretative regulations (29 C.F.R. 1604) as Questions and Answers 21 and 22, which was issued seven months after passage of the PDA and several days before its effective date with regard to such fringe benefits as health insurance plans (see p. 3 & n.2, *supra*). Great weight should be given to that construction. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Indeed, to sustain an agency's interpretation of the statute for which it is responsible, a court " 'need not find that [the agency's] construction is the only reasonable one, or even that it is [a] result [the court] would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). Rather, that interpretation must be sustained absent "compelling indications that it is wrong." *Miller* v. *Youakim*, 440 U.S. 125, 144-145 n.25 (1979); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973). Moreover, judicial deference is particularly appropriate here, because the head of EEOC informed the Congress of the agency's construction of the statute—stated in the Questions and Answers and urged here—while the PDA was still under consideration, and that construction was not challenged (see pp. 25-26, *supra*). *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969); accord *Power Reactor Development Co.* v. *Int'l Union of Electrical Workers*, 367 U.S. 396, 409 (1961); *Baltimore & O. C.T.R.R.* v. *United States*, 583 F.2d 678, 684 (3d Cir. 1978), cert. denied, 440 U.S. 968 (1979).

Nothing in petitioner's extended attack on the EEOC's interpretation (Pet. Br. 32-41) lessens the weight to which it is entitled. The alleged inconsistencies between Questions and Answers 21 and 22, the Senate Report, and the EEOC's 1972 sex discrimination guideline (29 C.F.R. 1604.9 (d)) to which petitioner points (Pet. Br. 33-36) are illusory. Answer 21 states that "if an employer's insurance pro-

gram covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions." Answer 22 reiterates this principle, while making clear that "it is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees." Contrary to petitioner's claim (Pet. Br. 34-36), this position is obviously consistent with the statement in the Senate Report that the PDA "would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant." S. Rep. No. 95-331, *supra*, at 6; Leg. Hist. 43. The thrust of both is that comparable insurance coverage must be provided to employees with respect to their own coverage, and with respect to that provided to their families.

The opening clause of 29 C.F.R. 1604.9(d), which prohibits unequal treatment of employees with respect to receipt of benefits for dependents,[34] is likewise consistent with the Senate Report's emphasis on comparison between employees and not between employees and spouses. The guideline further states that it is unlawful "to make available benefits for the wives of male employees which are not

---

[34] Section 1604.9(d) provides in full that:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

made available for female employees," *e.g.*, to provide that "wives of male employees [will] receive maternity benefits while female employees receive no such benefits." This provision addresses an historical practice of invidious discrimination against women workers that the Senate Report also characterized as invalid under the PDA:

> Information presented to this committee revealed that • • • otherwise comprehensive medical plans have sometimes provided maternity coverage to wives of employees but not to women employees • • • which practice[] would clearly be invalid under this bill • • •.

S. Rep. No. 95-331, *supra*, at 6; Leg. Hist. 43.

Equally without merit is petitioner's argument that the Commission misapplied "existing Title VII principles" in explaining the rationale of Questions and Answers 21 and 22 at the time of their publication in final form (Pet. Br. 37-39). As we have shown (pp. 23-24, *supra*), petitioner's insistence that *Gilbert* "establishes the only pertinent 'Title VII principles'" (Pet. Br. 37) is erroneous.[35] Petitioner also claims that our initial explanation of Questions and Answers 21 and 22, as incorporating existing Title VII principles, is "flatly contradicted" by our position here that spousal pregnancy coverage "is mandated • • • by the PDA itself." (Pet. Br. 39). This is plainly wrong. The rationale underlying our initial explanation, and which underlies our position in this Court, rests on substantive Title VII precepts operating in conjunction with our interpretation of the PDA, *i.e.*, that Title VII as amended by the PDA applies to all claims of discrimination, submitted by men or women, involving pregnancy, that dependent health coverage is a benefit for employees, and that lesser defendant coverage for employees of one sex than for those of the other sex is unlawful. See pp. 8-10, *supra*.

[35] The fact that there are no pre-PDA cases in which the practice at issue here was litigated obviously does not mean, as petitioner suggests (Pet. Br. 40 n.49), that the practice was perceived as lawful. As Justice Brennan pointed out in his dissent in *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 155-158, the relationship between sex discrimination and pregnancy was "an admittedly complex problem" which the EEOC definitively resolved only in 1972. Four years later, this Court in *Gilbert* denied any such relationship even with respect to discrimination against women employees. The dearth of agency or judicial attention to discriminatory spousal pregnancy coverage under medical insurance plans is, therefore, understandable.

tioner's additional charge that the Commission's position requiring equal benefits for employees of both sexes regardless of costs is an "anomaly" because, *inter alia*, the Department of Labor requires only equal benefits or contributions under the Equal Pay Act (Pet. Br. 37 and n.46), ignores the fact that this Court expressly rejected the Department of Labor's interpretation in *Los Angeles Dep't of Water and Power* v. *Manhart*, *supra*, 435 U.S. at 714 n.26.[36]

[36] The Department of Labor subsequently proposed amending its interpretation (29 C.F.R. 800.116(d)) to conform with the EEOC's requirement (29 C.F.R. 1604)—cited with approval in *Manhart* (435 U.S. at 720 n.37)—that benefits must be equal regardless of cost. See 46 Fed. Reg. 38029 (1981). Prior to publication of the amendment in final form, Equal Pay Act enforcement authority was transferred to the EEOC, which has proposed the same amendment. See 29 C.F.R. 1620.5 (1981), 46 Fed. Reg. 43848, 43851 (1981). Petitioner's citation to the regulation of the Department of Labor's Office of Federal Contract Compliance Programs (Pet. Br. 37 n.46) similarly ignores the fact that that office has likewise proposed changing its regulation to require that fringe benefits for employees of both sexes must be equal. See 46 Fed. Reg. 42968, 42971 (1981) (41 C.F.R. 60-1.21); 41 C.F.R. 60-20.3(c) (1982).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

MICHAEL N. MARTINEZ
Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

SUSAN BUCKINGHAM REILLY
Attorney
Equal Employment Opportunity Commission

MARCH 1983

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2109

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: March 19, 1984
Time: 10:00 a.m.
Place: Courtroom 14

TOPICAL INDEX

Pages

I INTRODUCTION JA-235

II BECAUSE THE STATE STATUTE PROTECTS CHILD-BEARING WORKERS AGAINST ADVERSE IMPACT IT IS CONSISTENT WITH AND NOT IN CONFLICT WITH TITLE VII JA-237

III PROOF OF ADVERSE IMPACT IN EACH CASE IS NOT REQUIRED IN ORDER TO JUSTIFY THE STATE STATUTE ON THE ADVERSE IMPACT THEORY JA-243

CONCLUSION JA-246

TABLE OF AUTHORITIES

Cases *Pages*

Federal

Abraham v. Graphic Arts Intern. Union (D.C. Cir. 1981) 660 F.2d 811 ..... JA-235, 236, 238, 243, 245

Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36 .....JA-241, 242

Arizona Governing Committee, Etc. v. Norris (1983) —— U.S. ——, 103 S.Ct. 3492 .... JA-244, 245

Connecticut v. Teal (1982) 457 U.S. 440 .....JA-244

DeCanas v. Bica (1976) 424 U.S. 351 .....JA-243

General Electric Co. v. Gilbert (1976) 429 U.S. 125 .....JA-239

Griggs v. Duke Power Co. (1971) 401 U.S. 424 ....JA-235

Grove City College v. Bell (Feb. 28, 1984) —— U.S. ——, 52 U.S.L. Week 4283 .....JA-242

Homemakers, Inc. of L.A. v. Division of Indus. Welf. (9th Cir. 1974) 509 F.2d 20 ..... JA-244, 245

North Haven Board of Education v. Bell (1982) 456 U.S. 512, 530-531.) JA-241, 242

Sprogis v. United Air Lines, Inc. (7th Cir. 1971) 444 F.2d 1194 .....JA-244

Steelworkers v. Weber (1979) 443 U.S. 193, rehg. den. 444 U.S. 889 .....JA-242

Trustees of Indiana University of United States (Ct. Cl. 1980) 618 F.2d 736 .....JA-242

U.S. v. Amer. Trucking Ass'ns. (1940) 310 U.S. 534 .....JA-242

Ward & Gow v. Krinsky (1922) 259 U.S. 503 .....JA-243

TABLE OF AUTHORITIES

Cases *Pages*

California

Lewis v. Unemployment Ins. Appeals Bd. (1976) 56 Cal.App.3d 729 .....JA-238

Other States

State v. Grayson (Mo. 1942) 163 S.W.2d 335 .....JA-238

Statutes

Federal

34 C.F.R. §§ 106.51-106.61 .....JA-242

34 C.F.R. § 106.57 .....JA-241

45 C.F.R. § 86.57 .....JA-241

California

Cal. Gov. Code, § 12920 .....JA-243

§ 12945 .....JA-235

Other States

Connecticut Human Rights and Opportunities Act, formerly Conn. Gen. Stat. § 31-126, now § 46a-60(a)(7) JA-240

Montana Maternity Leave Act, Montana Code Annotated, formerly §§ 39-7-203 and 39-7-204, now § 49-2-310 et seq. JA-240

Regulations

Federal

42 U.S.C. § 2000(e) et seq. JA-235

42 U.S.C. § 2000e(k) JA-235

20 U.S.C. § 1681 et seq. JA-241

TABLE OF AUTHORITIES

Pages

Congressional Bills/Reports

H.R. Rep. No. 95-948, 2nd Sess. (1978), reprinted in [1978] U.S. Code Cong. & admin. News JA-238, 239, 240

Sen. Rep. No. 95-331, 1st Sess. (1977) JA-239, 240, 241

Books

Oregon Sex Discrimination Guidelines, reprinted in 3 CCH Employment Practices Guide, ¶ 27,100.02.) JA-240

Section 626.5, "Maternity Leave," reprinted in EEOC Compliance Manual (CCH) ¶ 4805 ....JA-241

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2109

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 83-4927 R

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Plaintiffs,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Defendants.

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: March 19, 1984
Time: 10:00 a.m.
Place: Courtroom 14

I

INTRODUCTION

As defendants have set forth in detail in their Motion For Summary Judgment ("Defendants' Motion"), California Government Code section 12945(b)(2) ("the state statute") protects childbearing workers disabled by pregnancy, childbirth and related medical conditions from the adverse impact on the basis of sex associated with employment policies which fail to provide sufficient leave or reinstatement. Plaintiffs nevertheless maintain that the state statute is preempted by Title VII (42 U.S.C. § 2000(e) et seq.), alleging that the state statute conflicts with the literal terms of the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k), and is contrary to both the legislative history of the PDA and the guidelines propounded by the Equal Employment Opportunity Commission ("EEOC") on Sex Discrimination. Plaintiffs contend that the adverse impact theory cannot reconcile this conflict.

Plaintiffs' argument ignores the fact that equal treatment may nevertheless violate Title VII when it has an adverse impact on a protected class (see e.g. *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424) and, more specifically, that facially neutral employment leave policies may violate Title VII when they have an adverse impact on women in their role as childbearers. (See *Abraham* v. *Graphic Arts Intern. Union* (D.C. Cir. 1981) 660 F.2d 811.) Plaintiffs also argue that the PDA, merely one provision within Title VII, should be construed literally, when to do so would defeat the purposes of Title VII. By mandating reasonable pregnancy leave and by requiring reinstatement unless justified by business necessity, the state statute is consistent with the protections afforded by Title VII. Nor is the adverse impact protection afforded by the state statute in conflict with either the legislative history of the PDA or the EEOC Guidelines on Sex Discrimination.

Plaintiffs also maintain that defendants have not established that the failure to guarantee reinstatement after pregnancy disability leave has an adverse impact in fact and that the state statute is invalid since it requires reinstatement in all cases, regardless of whether adverse impact has been demonstrated. This argument is meritless insofar as it is based upon a mischaracterization of the state statute, which does not impose an absolute requirement of reinstatement. Further, plaintiffs' argument presupposes that adverse impact must be demonstrated in each case in order to reconcile the state statute with Title VII. This is not so. The California Legislature is presumed to have made the finding that the state statute was necessary in order to protect childbearing workers against adverse impact resulting from inadequate leave policies. The state statute thus encompasses the adverse impact theory of discrimination established by Title VII case law. The mere fact that the state statute creates the presumption that it is unlawful for an employer to fail to provide childbearing workers with reasonable pregnancy leave-reinstatement does not render it invalid or in conflict with Title VII.

It is clear that a facially neutral employment disability policy which adversely impacts childbearing workers and which is not justified by business necessity violates Title VII. (See *Abraham* v. *Graphic Arts Intern. Union, supra,* 660 F.2d 811.) Plaintiffs' self-serving attempt to minimize the significance of the holding in *Abraham* by noting that is the *only* case which "suggests that a policy which treats employees disabled by pregnancy the same as those disabled by other medical conditions is unlawful under Title VII" (see Plaintiffs' Opposition, p. 13) is to no avail. *Abraham* is the only case since the passage of the PDA which has considered and ruled on the issue of whether a facially neutral disability leave policy violates Title VII by having adverse impact on women. The court in *Abraham* found that it does. The state statute is based upon the same

conclusion and hence is consistent with and not in conflict with Title VII.

II

BECAUSE THE STATE STATUTE PROTECTS CHILDBEARING WORKERS AGAINST ADVERSE IMPACT IT IS CONSISTENT WITH AND NOT IN CONFLICT WITH TITLE VII

Plaintiffs' preemption attack is not based upon a challenge to the state statute's requirement of pregnancy leave per se. Rather, plaintiffs' focus is upon defendants' interpretation of the state statute, which requires that a female employee on pregnancy/childbirth disability leave be returned to her original or substantially similar job within a reasonable period of time. Plaintiffs argue that the state statute is silent concerning reinstatement and that guaranteed reinstatement is contrary to the express language of the PDA, the EEOC guidelines and the legislative history of the PDA. (See Opposition, pp. 2, 5-14.) Since defendants have already discussed these issues in detail (see Defendants' Motion, p. 30, et seq., and Defendants' Response to Plaintiffs' Motion For Summary Judgment ["Defendants' Response], p. 9, et seq.), defendants will only briefly reply to these arguments herein.

The California Legislature enacted the state statute to protect childbearing workers from the adverse impact on the basis of sex associated with facially neutral employment policies providing inadequate disability leave. Plaintiffs do not dispute this. Plaintiffs do maintain that the statute is silent on the subject of reinstatement. However, it strains logic to restrict the state statute to requiring merely reasonable leave and not also to mandating reinstatement. The concept of a leave on account of pregnancy, childbirth or related medical conditions necessarily includes a return from that leave. In ordinary usage, the term "leave of absence" means that the employee has been given

permission to be absent from work for a certain period of time, at the end of which he or she will return to his or her employment status. (See *Lewis* v. *Unemployment Ins. Appeals Bd.* (1976) 56 Cal.App.3d 729, 739 [128 Cal.Rptr. 795]; *State* v. *Grayson* (Mo. 1942) 163 S.W.2d 335, 341.) Were the state statute limited in its application to simply requiring that employers grant leave to employees disabled by pregnancy, childbirth or related medical conditions, with no return guarantee, the state statute would effectively condone pregnancy-related layoffs and job terminations.[1] Layoffs and terminations are the end results of an employer policy which fails to provide sufficient leave and reinstatement. (See *Abraham* v. *Graphic Arts Intern. Union, supra,* 660 F.2d at 819.) Therefore, the state statute is ineffective unless reinstatement, in addition to leave, is required.

Plaintiffs incorectly assert that the adverse impact theory is contradicted by the literal language and legislative history of the PDA and by the EEOC guidelines interpreting the PDA. As defendants have already noted, the PDA cannot be read in an isolated context divorced from the rest of Title VII in resolving the preemption issue, since to do so would invalidate the Title VII adverse impact theory as applied to sex discrimination cases involving pregnancy. (See Defendants' Motion, p. 31, et seq., and Defendants' Response, p. 14, et seq.) The House Committee Report recommending passage of the PDA and cited by plaintiffs states that the PDA ". . . would eliminate the need *in most instances* to rely on the *impact approach*. . . ." (H.R. Rep. No. 95-948, 2nd Sess. p. 3 (1978), reprinted in [1978]

[1] In the administrative matter underlying the instant action, Cal Fed employee Lillian Garland was effectively on layoff for seven months before being reemployed by Cal Fed after she filed an employment discrimination complaint against Cal Fed with defendant Department of Fair Employment and Housing. (See Stipulated Finding of Fact No. 10.)

U.S. Code Cong. & Admin. News pp. 4749, 4751; emphasis added.) Implicit in this finding is the congressional recognition that in appropriate circumstances the adverse impact theory would continue to apply to pregnancy discrimination.

Moreover, plaintiffs' narrow reading of the legislative history of the PDA ignores the significance of the fact that the PDA was a clear congressional reaction to the Supreme Court's decision in *General Electric Co.* v. *Gilbert* (1976) 429 U.S. 125 (see Sen. Rep. No. 95-331, 1st Sess. p. 2 (1977); H.R. Rep. No. 95-948, 2nd Sess. p. 2 (1978), reprinted in [1978] U.S. Code Cong. & Admin. News 4749, 4750), wherein the Court approved an employer policy which provided reduced benefits for pregnant employees. The focus of congressional concern in enacting the PDA was to ensure against less favorable treatment for childbearing workers. This concern is clearly stated in the Senate Committee on Human Resources Report on the PDA:

> "[U]nder this bill, employees will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue; employers will not be able to set arbitrary time limits within which disabled women must return to work, or before which they may not return to work, if no such limits exist for other disabled employees; they will have to credit women with accumulated seniority after a pregnancy disability leave on the same terms applicable to other persons absent from work for other disabilities; and they will not be able to refuse to hire or promote women simply because they are pregnant.
>
> "*The proscription of such policies is perhaps the most important effect of this bill.* For, as the history of sex discrimination shows, such policies have long-term effects upon the careers of women and account in large part for the fact that women remain today pri-

marily in low-paying, dead-end jobs." (Sen. Rep. No. 95-331, 1st Sess. p. 6 (1977); emphasis added.)

By mandating equal treatment for childbearing workers, Congress was not thereby precluding states from ensuring equality of job opportunity. Plaintiffs have not pointed to anything in the legislative history of the PDA which would reflect congressional intent to invalidate a state statute which protects a class of employees against adverse impact in order to ensure equal employment opportunity.

Moreover, as defendants have noted (see Defendants' Motion, p. 34, et seq.), the House Education and Labor Committee Report recommending passage of the PDA cites with approval six states that already "specifically include pregnancy in their Fair Employment Practices laws: Alaska, Connecticut, Maryland, Minnesota, Oregon, and Montana." (H.R. Rep. No. 95-948, 2d Sess. p. 11 (1978), reprinted in [1978] U.S. Code Cong. & Admin. News pp. 4749, 4759.) At the time of the House Report the laws of Connecticut and Montana expressly required that employers provide female employees with reasonable pregnancy leave and reinstatement. (Connecticut Human Rights and Opportunities Act, formerly Conn. Gen. Stat. § 31-126, now § 46a-60(a)(7); Montana Maternity Leave Act, Montana Code Annotated, formerly §§-39-7-203 and 39-7-204, now § 49-2-310, et seq.)[2]

Plaintiffs' attempt to diminish the significance of the House Report's approval of these state laws by denoting it as a "mere reference" (Plaintiffs' Opposition, p. 24) is unpersuasive. Congress was obviously aware that Title VII preempts state laws which would require violating Title VII (see, e.g., Sen. Rep. No. 95-331. 1st Sess. p. 3. fn. 1

[2] It is also noteworthy that the Sex Discrimination Guidelines issued by the Oregon Bureau of Labor to explain state law in the area of sex discrimination require that employees provide reasonable pregnancy leave and reinstatement. (See *Oregon Sex Discrimination Guidelines*, reprinted in 3 *CCH Employment Practices Guide*, ¶ 27,100.02.)

(1977)) and it would not specifically refer to the fair employment laws of Connecticut and Montana if it considered those laws to be in conflict with the PDA. Plaintiffs assert that Congress' intent in discussing these state laws was simply to demonstrate that passage of the PDA would not economically impact the many employers who were already obligated to provide pregnancy benefits under these state laws and who had differing state law obligations. Even assuming the validity of plaintiffs' assertion, Congress would not have opined that employers were obligated to comply with these state laws if the laws were considered to be in conflict with Title VII.

Equally unpersuasive is plaintiffs' attempt to portray the EEOC Guidelines on Sex Discrimination as invalidating the adverse impact theory of employment discrimination in the area of pregnancy discrimination. (See Plaintiffs' Opposition, pp. 2, 8-11.) As defendants have noted (see Defendants' Response, pp. 13-14), it is clear from a reading of the EEOC's Compliance Manual that facially neutral employment policies having an adverse impact on pregnant employees, including policies relating to reinstatement, would be found by the EEOC to violate Title VII unless justified by business necessity. (See, e.g., § 626.5, "Maternity Leave," reprinted in EEOC Compliance Manual (CCH) ¶ 4805.) That the EEOC Guidelines also speak in terms of equal treatment does not change the fact that adverse impact discrimination is also unlawful.

Plaintiffs incorrectly assert that the pregnancy regulations issued by the Department of Education and Health and Human Services to effectuate Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., are irrelevant to a consideration of the requirements of Title VII. Title IX reflects Congress' desire to ban employment discrimination in federally financed education programs. (See *North Haven Board of Education* v. *Bell* (1982) 456 U.S. 512, 530-531.) As such, its purposes parallel those of Title VII. (See *Alexander* v. *Gardner-Denver Co.* (1974) 415 U.S.

36, 44.) The regulations issued by both the Departments of Education and Health and Human Services require employer-recipients of federal funding to provide reasonable pregnancy leave and reinstatement to female employees (see 34 C.F.R. § 106.57(d) and 45 C.F.R. § 86.57(d)), notwithstanding what the employer provides to other disabled employees. (See Defendants' Motion, pp. 16-18.) Congress was provided with the opportunity to disapprove the Department of Education's regulations interpreting Title IX; its failure to disapprove those regulations prohibiting discriminatory employment practices, of which the pregnancy leave/reinstatement requirements are a part (34 C.F.R. §§ 106.51-106.61), implies that the regulations accurately reflect congressional intent in the area of employment discrimination. (See *Grove City College* v. *Bell* (Feb. 28, 1984) —— U.S. ——, 52 U.S.L. Week 4283 at p. 4287; *North Haven Board of Education* v. *Bell, supra,* 456 U.S. 512, 530-535.)

Plaintiffs argue that these regulations require preferential treatment and therefore conflict with the equal treatment mandate of Title VII. Contrary to plaintiffs' assertion, these regulations are consistent with Title VII; they are reflective of the need to provide pregnancy leave and reinstatement to childbearing workers in order to prevent employment discrimination against women.

Finally, plaintiffs' narrow focus on the literal language of the PDA ignores the fact that one section of Title VII may not be read in isolation from the rest of Title VII. (See e.g., *Steelworkers* v. *Weber* (1979) 443 U.S. 193, rehg. den. 444 U.S. 889.) Indeed, when the plain or literal meaning of a statute produces a result plainly at variance with the policy of the legislation as a whole, courts have "followed that purpose, rather than the literal words." (*U.S.* v. *Amer. Trucking Ass'ns.* (1940) 310 U.S. 534, 543; see also *Trustees of Indiana University* v. *United States* (Ct. Cl. 1980) 618 F.2d 736, 739.) Each provision of Title VII, including the PDA, must be read in context with the rest of

Title VII to achieve its purpose to eliminate all forms of employment discrimination, including that of adverse impact discrimination in the area of pregnancy disability leave.

III

PROOF OF ADVERSE IMPACT IN EACH CASE IS NOT REQUIRED IN ORDER TO JUSTIFY THE STATE STATUTE ON THE ADVERSE IMPACT THEORY

Plaintiffs argue that, even assuming the state statute was enacted to prevent adverse impact and that reinstatement is also mandated toward that end, it has not been established that a failure to guarantee reinstatement after a pregnancy disability leave of up to four months actually has an adverse impact. (Plaintiffs' Opposition, p. 15.) Plaintiffs maintain that because the state law requires reinstatement in all cases, regardless of whether an employer's policy has an adverse impact, it is invalid. (Plaintiffs' Opposition, p. 16.)

Plaintiffs' arguments are meritless for several reasons. As defendants have already noted (Defendants' Response, p. 10), the state has broad police power authority to regulate the employment relationship in order to protect workers within the state. (*DeCanas* v. *Bica* (1976) 424 U.S. 351, 356.) Pursuant to this authority (see Cal. Gov. Code, § 12920), the California Legislature enacted the statute in issue here to protect against adverse impact to childbearing workers resulting from inadequate leave/reinstatement policies. (See Defendants' Motion, p. 22, et seq.) There is the strong presumption that in enacting the state statute the Legislature correctly understood the needs of its citizens and that the conditions imposed by the state statute are based upon adequate justification. (See *Ward & Gow* v. *Krinsky* (1922) 259 U.S. 503, 521.) The state has made the determination that failure to provide reasonable leave/reinstatement has an adverse impact on childbearing work-

ers and this determination is eminently justified. "Pregnancy and childbirth are, of course, phenomena shared only by women, and only female employees are susceptible to employment losses which may be tied to either." (*Abraham* v. *Graphic Arts Intern. Union, supra,* 660 F.2d 811, 819.) As defendants have noted, judicial notice may be taken of the fact that since only women become pregnant, a policy which fails to provide sufficient leave or reinstatement will have an adverse impact on women workers because of their unique status as childbearers. (See Defendants' Motion, pp. 20-21.)[3] The fact that proof of adverse impact in each case is not required under the state statute in no way invalidates it, as plaintiffs suggest.[4]

Plaintiffs incorrectly characterize defendants' position as "based upon generalizations concerning women as a group." (Plaintiffs' Opposition, p. 18.) The fact that only women and not men become pregnant is an absolute biological certainty, not a stereotypic generalization. Therefore, plaintiffs' reliance upon *Homemakers, Inc. of L.A.* v. *Division of Indus. Welf.* (9th Cir. 1974) 509 F.2d 20, and *Arizona Governing Committee, Etc.* v. *Norris* (1983) —— U.S. ——, 103 S.Ct. 3492, is misplaced. As defendants have

[3] Since judicial notice of adverse impact may be taken, Plaintiffs' Statement of Genuine Issues fails to set forth any disputed facts as to which evidence is required.

[4] Plaintiffs incorrectly assert that an employer policy under which 95 percent of its male and 95 percent of its female coworkers on disability leave are returned to employment does not have an adverse impact on women. (Plaintiffs' Opposition, p. 15.) "The effect of the statute [Title VII] is not to be diluted because discrimination adversely affects only a portion of the protected class." (*Sprogis* v. *United Air Lines, Inc.* (7th Cir. 1971) 444 F.2d 1194, 1198, cert. den. 404 U.S. 991.) The fact remains that ". . . an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of . . . discrimination.'" (*Connecticut* v. *Teal* (1982) 457 U.S. 440, 455.)

noted (see Defendants' Response, pp. 17-19), underlying the decisions in these cases is the assumption that sex-differential treatment is in conflict with Title VII when it is based upon stereotyped assumptions about the sexes (e.g., *Homemakers*—overtime pay necesary for females but not males) or normative differences between the sexes (e.g., *Norris*—reduced retirement benefits to women because statistically they live longer than men), resulting in over or under-inclusive classifications.[5] However, since no man will ever need a pregnancy-related leave, since non-pregnant women are not eligible and therefore not entitled to pregnancy leave, and since pregnant women are not required to avail themselves of pregnancy-related leaves, the state statute, unlike the policy in *Norris* or the law in *Homemakers,* is neither over nor under-inclusive. The state statute prevents women from having to suffer employment-related burdens which no male would ever have to bear (see *Abraham* v. *Graphic Arts. Intern. Union, supra,* at p. 819), and thereby places women on an equal footing with men in the job market.

Plaintiffs' assertion that defendants interpret the state statute to mandate "absolute" reinstatement in all cases (Plaintiffs' Opposition, p. 16) is incorrect. While the failure to provide reasonable pregnancy/childbirth leave not exceeding four months and/or reinstatement is presumed to violate the statute, the employer may demonstrate that the particular policy in issue is justified by business necessity. (See Proposed Regulation §§ 7291.2(b)(7) and (c)(2)C), attached as Exhibit A to the Stipulated Findings of Fact.)

[5] Similarly, plaintiffs' hypothetical concerning a state law which presumes that blacks will be adversely affected by written tests (see Plaintiffs' Opposition, p. 17), rests upon a stereotyped generalization and therefore is in no way analogous to the state statute in issue here.

CONCLUSION

Plaintiffs' literal reading of the PDA ignores the adverse impact proscription of Title VII and the purpose of the state statute, consistent with that of Title VII, to protect childbearing workers against adverse impact. Plaintiffs' attempt to analogize the state statute to laws and policies invalidated by Title VII as based upon discriminatory sexual stereotypes must fail. It is a biological certainty that only women become pregnant. The state's determination that women affected by pregnancy, childbirth or related medical conditions require leave and reinstatement is an appropriate exercise of its police power to ensure women equality of job opportunity, a goal consistent with Title VII. Because the state statute is not in conflict with Title VII it is not preempted by Title VII.

Therefore, defendants are entitled to summary judgment herein.

DATED: MARCH 12, 1984

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MARIAN M. JOHNSTON,
ELLYN S. LEVINSON,
MARC E. TURCHIN,
Deputy Attorneys General

/s/ MARC E. TURCHIN
Marc E. Turchin

Attorneys for Defendants

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 85-494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS and LOAN ASSOCIATION a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; and the CALIFORNIA CHAMBER OF COMMERCE, a non-profit California Corporation,

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; and the FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

On Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

---

BRIEF FOR THE PETITIONERS

Attorneys for Petitioners
California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce

**Counsel of Record*

WILLARD Z. CARR, JR.
*THEODORE B. OLSON
PAMELA L. HEMMINGER
PAUL BLANKENSTEIN
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, which prohibits employment discrimination on the basis of pregnancy, preempts, under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, a California law requiring employers to provide leave and reinstatement rights to employees disabled by pregnancy, but not to employees disabled by other medical conditions.*

---

* All petitioners and respondents in this action are named in the caption; however, the applicant for intervention in the proceeding below has not been named. Lillian Garland, an employee whose complaint triggered enforcement activity against petitioner California Federal Savings and Loan Association by the respondent Department of Fair Employment and Housing, sought to intervene in the action after judgment was entered by the district court. The motion to intervene was denied, and her appeal, No. 85-5844, was consolidated with the appeal in this action, No. 84-5843. The denial of the motion to intervene was affirmed by the Ninth Circuit, and review of that decision has not been sought. Petitioners have given notice pursuant to Supreme Court Rule 19.6 of their belief that Garland has no interest in the outcome of this case.

CalFed Inc. is the parent company of petitioner California Federal Savings and Loan Association; there are four other first tier subsidiaries of CalFed Inc.: California Thrift and Loan; Trust Services of America, Inc.; CalFed Investment Corp.; and CalFed Insurance Corporation. Petitioners Merchants and Manufacturers Association and the California Chamber of Commerce brought suit on behalf of their members who have fifteen or more employees and are "employers" within the meaning of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e(b)), and within the meaning of the California Fair Employment and Housing Act (Cal. Gov't Code § 12926(c)).

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY INVOLVED	1
Constitution of the United States	1
Federal Law and Authority	2
State Law and Authority	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	9
ARGUMENT	12
A. Title VII, As Amended By The Pregnancy Discrimination Act Of 1978, Requires That Employees Affected By Pregnancy Be Treated The Same For All Employment-Related Purposes As Employees Affected By Comparable Medical Conditions	12
1. Basic Title VII Principles Prohibit Preferential Treatment of Employees On The Basis Of Sex	13
2. The PDA Does Not Alter Title VII's Basic Principles	16
a. The language of PDA is clear and unambiguous	18
b. The legislative history of the PDA reinforces the plain meaning of the statute	20
c. The EEOC has interpreted the PDA as barring different treatment based upon the condition of pregnancy	26

d. *Newport News* supports the position that Title VII and the PDA require that pregnant employees be treated the same as similarly situated non-pregnant employees	29
B. The California Pregnancy Disability Law Is Preempted By Title VII	33
1. Conflicting State Laws Are Preempted By Title VII	33
2. The California Pregnancy Disability Law Is Inconsistent With And Thus Preempted By Title VII	35
3. The California Pregnancy Disability Law is Not Defensible Under Any Recognized Disparate Impact Analysis	36
C. The California Pregnancy Disability Law Cannot Be Harmonized With Title VII By Extending The Statute To Cover Non-Pregnant Employees	43
CONCLUSION	49

TABLE OF AUTHORITIES

CASES: Page

Arp v. Workers' Compensation Appeals Board, 19 Cal. 3d 395, 138 Cal. Rptr. 293, 563 P.2d 849 (1977) 47

Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981) 38

Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7 (1983) 34

Arkansas v. Fairfield Communities Land Co., 260 Ark. 277, 538 S.W. 2d 698, *cert. denied*, 429 U.S. 1004 (1976) 46

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 31, 42

Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 106 S. Ct. 681 (1986) 18

Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972) 36, 46

Caban v. Mohammed, 441 U.S. 380 (1979) 44

Califano v. Westcott, 443 U.S. 76 (1979) 43

Califano v. Goldfarb, 430 U.S. 199 (1977) 43

Caminetti v. United States, 242 U.S. 470 (1917) .. 18

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) 18

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 33

Connecticut v. Teal, 457 U.S. 440 (1982) 42

Craig v. Boren, 429 U.S. 190 (1976) 45

Dothard v. Rawlison, 433 U.S. 321 (1977) 37

EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) 28

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 20

Table of Authorities Continued

Page

Fidelity Federal Savings and Loan Assoc. v. De La Cuesta, 458 U.S. 141 (1982) 34

Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) 39

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 34

Frontiero v. Richardson, 411 U.S. 677 (1973) 43

Fullilove v. Klutznick, 448 U.S. 448 (1980) 14

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 13

Geduldig v. Aiello, 417 U.S. 484 (1974) 16-17

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) ..... *passim*

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 13, 14, 36

Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972) 46

Heckler v. Matthews, 465 U.S. 728 (1984) 43

Homemakes, Inc. of Los Angeles v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976) 36, 45, 46

Hines v. Davidowitz, 312 U.S. 52 (1941) 34

Hughes v. Superior Court, 339 U.S. 460 (1950) ... 14

INS v. Phinpathya, 464 U.S. 183 (1984) 18

International Brotherhood of Teamsters v. United States, 431U.S. 324 (1977) 36, 37

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 33, 34

Kansas Association of Commerce and Industry v. EEOC, 33 FEP Cases 588 (D. Kan. 1983) 28

Lalli v. Lalli, 439 U.S. 259 (1978) 44

Table of Authorities Continued

Page

Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) 14, 31, 32, 42

MacDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 14

Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd on other grounds*, 707 F.2d 1005 (8th Cir. 1983) 41

Miller v. Youakim, 440 U.S. 125 (1979) 28

Muller v. Oregon, 208 U.S. 412 (1908) 26

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) ..... *passim*

Orr v. Orr, 440 U.S. 268 (1979) 26, 45

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 105 S. Ct. 658 (1985) 18

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 28

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 34

Stanton v. Stanton, 421 U.S. 7 (1975) 26, 45

United States v. Oregon, 366 U.S. 643 (1961) 20

United States v. Turkette, 452 U.S. 576 (1981) 23

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 32

University of California Regents v. Bakke, 438 U.S. 265 (1978) 14

Weinberger v. Wiesenfield, 420 U.S. 636 (1975) ... 43

Welsh v. United States, 398 U.S. 333 (1970) 43

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) 44

CONSTITUTION, STATUTES AND RULES:

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. VI, cl. 2 ..... 1, 33

Table of Authorities Continued

Page

FEDERAL STATUTES AND REGULATIONS:

28 U.S. § 1254(1) 1

29 U.S.C. § 1144(a) 8

42 U.S.C. §§ 2000e *et seq* 4

42 U.S.C. § 2000e(b) 6

42 U.S.C. § 2000e(k) (Pub. L. No. 95-555, 92 Stat. 2076 ..... 2, 4-5, 10, 18, 35

42 U.S.C. § 2000e-2(a) 2, 13

42 U.S.C. § 2000e-7 ..... 2-3, 35, 36

42 U.S.C. § 2000h-4 ..... 3, 35, 36

29 C.F.R. Part 1604 ..... 26, 27

29 C.F.R. § 1604-10(b) 27

CALIFORNIA STATUTES:

Cal. Labor Code § 1420.35 5

Cal. Labor Code § 1420.35(b)(2) 5

Cal. Gov't Code § 12901 5

Cal. Gov't Code § 12903 5

Cal. Gov't Code § 12945(b)(2) 5, 6

Cal. Gov't Code § 12926(c) 6

LEGISLATIVE MATERIALS:

H.R. Rep. No. 948, 95th Cong., 2d Sess. (1978) 20, 21, 22, 25, 37

S. Rep. No. 331, 95th Cong., 1st Sess. (1977) 19, 21, 22, 24, 46

110 Cong. Rec. 1518 (1964) (remarks of Rep. Celler) 15

110 Cong. Rec. 6564 (1964) (remarks of Sen. Kuchel) 15

Table of Authorities Continued

Page

110 Cong. Rec. 7247 (1964) (remarks of Sen. Case) 15

110 Cong. Rec. 8921 (1964) (remarks of Sen. Williams) 15

110 Cong. Rec. 11848 (1964) (remarks of Sen. Humphrey) 15

123 Cong. Rec. 7540 (1977) (remarks of Sen. Williams) 19, 25

123 Cong. Rec. 29385 (1977) (remarks of Sen. Williams) 22-23

123 Cong. Rec. 29664 (1977) (remarks of Sen. Brooke) 25

123 Cong. Rec. 29387 (1977) (remarks of Sen. Javits) 25, 26

123 Cong. Rec. 29645 (1977) (remarks of Sen. Stafford) 23

123 Cong. Rec. 29652 (1977) (remarks of Sen. Williams) 22

123 Cong. Rec. 8144 (1977) (remarks of Sen. Bayh) 23

123 Cong. Rec. 29641 (1977) (remarks of Sen. Bayh) 24

124 Cong. Rec. 21439 (1978) (remarks of Rep. Akaka) 40

124 Cong. Rec. 29652 (1978) (remarks of Sen. Javits 23

131 Cong. Rec. E 1537 (1985) 48

131 Cong. Rec. H 1942 (1985) 48

Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 40, 41

Table of Authorities Continued

Page

MISCELLANEOUS:

Equal Employment Opportunity Commission Compliance Manual [CCH] 4804 (12-83) 29

Hypertension and Hypertensive Heart Disease in Adults, National Center for Health Statistics, DHEW Publication No. (HRA) 74-1282, *Vital and Health Statistics*, Series 11, No. 13, Table 2.2 39

Legislative Analysis of AB 1960, Author: Berman; Subject: *Employment Discrimination Based on Pregnancy,* Assembly Committee on Labor, Employment and Consumer Affairs, Bill Lockyer, Chairman 48

Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness,* 81 Mich. L. Rev. 1379 (1983) 40

M. Rudov and N. Santangelo, *Health Status of Minorities and Low Income Groups*, DHEW Pub. No. (HRA) 79-627 (1979) 39

B. Scheli and P. Grossman, *Employment Discrimination Law*, 369 (2d ed. 1983) 46

U. S. Department of Commerce, Bureau of the Census, Labor Force Status and Other Characteristics of Persons with a Work Disability: 1982 (1983) 39

Washington, *The Special Health Hazards for Women at Work With an Emphasis on Stress*, 14 The Forum 503 (1979) 39

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A, is reported at 758 F.2d 390. The unpublished memorandum opinion of the court of appeals on a related matter is reproduced at Pet. App. B. The court of appeals' order amending the published opinion is reproduced as Pet. App. C, and its order denying the petition for rehearing and suggestion for rehearing *en banc* is reproduced as Pet. App. D. The opinion of the district court, Pet. App. E, is unofficially reported at 34 FEP Cases 562.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on April 16, 1985. A petition for rehearing and suggestion for hearing *en banc* was timely filed on April 30, 1985, and was denied by the court of appeals on June 21, 1985. The petition for a writ of certiorari was timely filed within ninety days of that date and was granted by this Court on January 13, 1986.

CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY INVOLVED

Constitution of the United States

The Supremacy Clause, art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Law and Authority

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 701(k) of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, ...

Section 708 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-7, provides:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Section 1104 of Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4, provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

State Law and Authority

The California Fair Employment and Housing Act, Cal. Gov't Code § 12945, provides, in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
>
> * * *
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . . .
>
> * * *
>
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time.

> Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions . . . .

The proposed regulations of the California Fair Employment and Housing Commission, embodying respondents' enforcement policy, are reproduced in Pet. App. F.

STATEMENT OF THE CASE

This case results from the conflicting responses by Congress, on one hand, and by the State of California, on the other, to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Court held that an employer's exclusion of pregnancy coverage from an otherwise comprehensive disability insurance plan was not unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, because discrimination on the basis of pregnancy was not discrimination on the basis of sex within the meaning of Title VII.

Two years later, in 1978, Congress enacted the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076, which amended Title VII for the specific purpose of overruling the *Gilbert* interpretation of Title VII and in order expressly to equate "discrimination on the basis of pregnancy" with Title VII's prohibition of discrimination on the "basis of sex" or "because of sex." As amended by the PDA, Title VII now includes discrimination on the basis of "pregnancy, childbirth, or related medical conditions"[1] within its definition of sex discrimination, and declares that women affected by pregnancy "shall be treated the same for all employment-related purposes, . . ., as other persons not so affected but similar in

[1] For the purpose of economy of expression, the term "pregnancy" as used in this brief, includes "pregnancy, childbirth, or related medical conditions."

their ability or inability to work, ..." 42 U.S.C. § 2000e(k).

In the same year, the California legislature, also responding to the ruling in *Gilbert*, enacted an amendment to the state's Fair Employment and Housing Act, Cal. Labor Code § 1420.35, Stats 1978, ch. 1321, § 1, now codified at Cal. Gov't Code § 12945(b)(2),[2] requiring employers within the state to provide female employees with unpaid pregnancy disability leave for a period of up to four months. As authoritatively interpreted and enforced by the respondents,[3] Section 12945(b)(2) requires employers to reinstate female employees returning from pregnancy disability leave to the job previously held, unless that position is no longer available due to business necessity, in

[2] The California law was approved by the Governor of California on September 28, 1978. The PDA was signed by the President on October 31, 1978. Pub. L. No. 95-555, § 1, 92 Stat. 2076. (Oct. 31, 1978).

In 1979, the state law was amended to exclude Title VII employers from coverage under certain provisions of the statute. However, Cal. Labor Code § 1420.35(b)(2), requiring employers to extend up to a four month pregnancy disability leave, was expressly declared applicable to employers subject to Title VII. Stats 1979, ch. 13 § 1. In 1980, Cal. Labor Code 1420.35(b)(2) was recodified in its current form as Cal. Gov't Code § 12945(b)(2), Stats 1980, ch. 992 § 4.

[3] The respondent Fair Employment and Housing Commission is a state agency established under Cal. Gov't Code § 12903. Among other duties, the Commission issues rules and regulations which interpret, implement and apply the various provisions of the state's Fair Employment and Housing Act, and conducts hearings on accusations brought against employers accused of having violated the Act. Respondent Cruz F. Sandoval is Chair of the Commission. (J.A. 39).

The respondent Department of Fair Employment and Housing is a state agency established under Cal. Gov't Code § 12901. As part of its duties, the Department issues accusations against employers charged with violating the state's Fair Employment and Housing Act, and prosecutes such accusations in proceedings before the Commission. Respondent Mark Guerra is the Director of the Department. (JA 39-40).

which case the employer must make a reasonable good faith effort to reinstate the employee to a substantially similar job.[4] The California pregnancy disability law also establishes a rebuttable presumption that the job in question can be held open or can be filled by a temporary employee during the pregnancy disability leave period.

Petitioner California Federal Savings and Loan Association ("Cal Fed") is a federally chartered savings and loan association that regularly employs more than fifteen employees and is engaged in an industry affecting interstate commerce, thereby making it an employer within the meaning of both Cal. Gov't Code § 12926(c) and Title VII, 42 U.S.C. § 2000e(b). As relevant here, Cal Fed's disability leave policy covers all disabilities, including disabilities caused by pregnancy. (J.A. 40). That policy allows employees to take disability leave, but does not define "leave" to guarantee that returning employees will be reinstated to the same position absent business necessity. Instead, Cal Fed's policy obligates the company to make every effort to provide the returning employee with another similar and suitable position. If a similar or suitable job is not available, irrespective of the medical condition causing the disability, Cal Fed's policy does not require it to reinstate the employee. (J.A. 40-41).

In May 1983, the respondent California Department of Fair Employment and Housing issued an administrative

---

[4] The respondents entered into Stipulated Findings of Fact, which are set forth in full in the district court's decision (Pet. App. E; J.A. 38-52), agreeing that proposed regulations of the respondent Fair Employment and Housing Commission embody their interpretation of Section 12945(b)(2). The respondents' interpretation of the statute is also set out in the Commission's precedential decision in *The Matter of the Accusation of the Department of Fair Employment and Housing* v. *Travel Express* (Case No. FEP 80-81 A7-0922s) (August 4, 1983). (Pet. App. E-10; J.A. 44). The state statute, as construed and enforced by respondents, is hereinafter referred to as "the California pregnancy disability law."

accusation against Cal Fed on behalf of an employee who had not been immediately reinstated to her previous position at the conclusion of her pregnancy disability leave.[5] (J.A. 41-42). The accusation charged that Cal Fed had violated the California pregnancy disability law, and, *inter alia*, sought to compel Cal Fed to amend its disability leave policies to conform to the statutory mandate requiring special treatment of female employees disabled by conditions associated with pregnancy. (J.A. 42).

On August 1, 1983, Cal Fed, joined by petitioners Merchants and Manufacturers Association and the California Chamber of Commerce,[6] brought this action against the respondents in federal district court, seeking a declaratory judgment that the California pregnancy disability law is inconsistent with and thereby preempted by Title VII, as

---

[5] The employee, Lillian Garland, who had been employed as a receptionist/[illegible] operator, began her pregnancy disability leave on January 18, 1982. On or about April 20, 1982, she notified Cal Fed that she was able to return to work. She was advised that no receptionist or similar position was available at that time. On or about November 17, 1982, Ms. Garland accepted Cal Fed's offer of a receptionist position in the bank's Accounting Department, and returned to work on or about November 22, 1982. (J.A. 41-42).

[6] Petitioner Merchants and Manufacturers Association is a trade association, which in February 1984 represented approximately 2,650 employers throughout the State of California. Petitioner California Chamber of Commerce has over 4,300 California business organizations as members. Both organizations have members that are employers subject to Title VII and which have disability leave policies similar to Cal Fed's. Petitioner Cal Fed is a member of both organizations. Both the Chamber and the Association advise their respective members of relevant state and federal legislative and judicial developments; appear on behalf of their members before local, state and federal legislative bodies; sponsor educational seminars and commission publications designed to inform their members of their obligations under state and federal laws; and, when necessary, initiate proceedings in state and federal courts to protect the interests of their members. (J.A. 38-39).

well as an injunction against its enforcement.[7] (*See* J.A. 60). Petitioners sought and obtained a preliminary injunction restraining respondents from enforcing the state law while the case was *sub judice* before the district court. (J.A. 10-11, 60).

The parties thereafter filed cross-motions for summary judgment based upon stipulated facts. (J.A. 8, 37-52, 54-55). On March 19, 1984, the district court granted petitioners' motion, holding that the California pregnancy disability leave law "which require[s] preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions [is] preempted by Title VII," and is, therefore, "null, void, invalid and inoperative under the Supremacy Clause of the United States Constitution." (Pet. App. E-15). The district court ruled that a disability leave policy, like Cal Fed's, which treats pregnant female employees the same "for all employment-related purposes, including reinstatement" as other employees "not so affected but similar in their ability or inability to work complies" with Title VII, as amended by the PDA. (*Id.* at 13). The district court determined that the requirement that employers give female employees disabled by pregnancy preferential disability leave rights was "inconsistent with the purpose of Congress in enacting the [PDA] to eliminate classifications based on pregnancy and with the purposes of Title VII to provide equal treatment for males and females." (*Id.* at 14). Accordingly, the court concluded that the California pregnancy disability law was preempted by Title VII because the state law required or permitted conduct unlawful under the federal statute. (*Id.* at 13-15).

---

[7] The complaint also alleged that the state disability leave statute was preempted by Section 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). The parties later stipulated that the ERISA claims should be dismissed without prejudice. (*See* J.A. 9-10).

The respondents appealed to the Ninth Circuit, which reversed the decision below and remanded the case to the district court with instructions to grant summary judgment for the respondents. (Pet. App. A-11). The court of appeals held that the "district court's conclusion that section 12945(b)(2) discriminates against men on the basis of pregnancy defies common sense, misinterprets case law, and flouts Title VII and the PDA." (*Id.* at 4) (footnote omitted). Stating that it was relying on this Court's decision in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983) (*"Newport News"*), the Ninth Circuit observed that in enacting the PDA Congress intended "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." (*Id.* at 10). According to the court of appeals, "the PDA did not demand that state law be blind to pregnancy's existence," and that there was no reason to "strip away" the one substantive benefit that California's pregnancy disability law provides. (*Id.* at 9, 10). The court concluded that "Title VII does not preempt a state law that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with, nor unlawful under, Title VII." (*Id.* at 11).

SUMMARY OF ARGUMENT

The fundamental principle of Title VII of the Civil Rights Act of 1964 is that an employer may not treat or classify employees on the basis of race, color, religion, sex or national origin. The question in this case is whether the California pregnancy disability law, which creates a special preference for female employees affected by pregnancy, is inconsistent with and thus preempted by Title VII.

In *General Electric Co. v. Gilbert*, this Court held that Title VII's ban on sex discrimination did not prohibit discrimination on the basis of pregnancy. Congress enacted

the PDA specifically to overrule that decision. The PDA amended Title VII's definition of sex discrimination to include discrimination on the basis of pregnancy. Under the PDA, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, . . . , as other persons not so affected but similar in their ability or inability to work, ..." 42 U.S.C. § 2000e(k). The PDA, therefore, did not alter Title VII's basic proscription of discrimination on the basis of an employee's sex, which protects male and female workers equally, but simply equated pregnancy with gender.

The contrary analysis of Title VII and the PDA by the court of appeals is based upon a misunderstanding of the policy choice made by Congress in adopting the PDA. Congress could have approached pregnancy as a condition that required accommodation by employers—not unlike the approach required in the area of religion. That, in essence, was the philosophical choice of the California legislature in imposing minimum standards for pregnancy disability leaves. However, Congress rejected this concept and instead insisted that pregnancy not be singled out for special treatment and that the condition of pregnancy, standing alone, be as irrelevant in the workplace as an employee's sex. The Ninth Circuit misread or misunderstood what Congress had done and construed the PDA revision of Title VII to prevent the condition of pregnancy from being a disadvantage in the employment context, but not an advantage.

There is no support for the Ninth Circuit's proposition that the PDA altered Congress' policy of equality of treatment in favor of requiring or permitting special accommodations for the condition of pregnancy. Congress did not intend to change Title VII's abiding principle that distinctions in the workplace based upon the sex of an employee encourage the treatment of individuals on the basis of impermissible distinctions and are intolerable re-

gardless which sex is benefited or harmed by the discrimination. On the contrary, the plain language of the PDA, its legislative history, the administrative interpretation of the Act by the agency charged with enforcing it, and this Court's decision in *Newport News*, all compel the conclusion that the PDA was not intended to and did not revise Title VII's flat prohibition of gender-based discrimination.

Although in enacting Title VII Congress did not occupy the field of employment discrimination laws to the exclusion of complementary state laws, the federal statute expressly preempts state laws that either "require or permit" an employer to engage in employment practices prohibited by Title VII, or which are inconsistent with any provision or purpose of the federal legislation. In other words, state laws that either prescribe discriminatory treatment, or leave to the employer the option of complying in a manner that tolerates discrimination on the basis of race, color, religion, sex or national origin are equally offensive to Title VII and are invalid.

There is no dispute that the California pregnancy disability law requires employers to treat pregnancy in a special way with minimum benefits not required for persons suffering from other conditions affecting the ability to work. Nor can there be much argument that this enactment reflects an approach to the condition of pregnancy that is diametrically opposed to Title VII's insistence that pregnancy not be singled out as a special condition. A California employer could comply fully with the California pregnancy disability law by providing disability leave and reinstatement rights only to pregnant employees, denying any leave to other employees "similar in their ability or inability to work." By doing so, however, that employer would violate the Title VII prohibition of discrimination on account of pregnancy. Therefore, the California pregnancy disability law "require[s] or permit[s]" an employer to engage in an employment practice prohibited by Title VII and establishes a regime which is inconsistent with

Title VII's purposes. The two laws cannot be reconciled because they rest on mutually exclusive principles regarding the elimination of discrimination based upon pregnancy.

The California pregnancy disability law cannot be justified, as respondents urged below, on the ground that it eliminates the adverse impact on women of a neutral employment policy. There is no evidence in the record to support the notion that neutral disability leave practices that do not provide the reinstatement guarantees required by the California law fall more harshly on women. Even if such evidence existed, the lawful remedy would not be the installation of policies that permit discriminatory treatment of non-pregnant employees. It is antithetical to the spirit, letter and purpose of Title VII to remedy discrimination against one group by enacting a law that compels or tolerates discrimination against members of another.

Nor can the California pregnancy disability law be rescued by extending it to cover disabilities other than pregnancy. The federal courts cannot reach out and impose such far-reaching changes on California employers, especially absent any evidence that the California legislature would have intended to extend the disability leave requirements that it enacted for employees affected by pregnancy to employees affected by all similar illnesses or disabilities. Extension is not compelled by any federal policy and is disfavored under California decisional law in the absence of a clearly expressed legislative intent.

ARGUMENT

A. Title VII, As Amended By the Pregnancy Discrimination Act Of 1978, Requires That Employees Affected By Pregnancy Be Treated The Same For All Employment-Related Purposes As Employees Affected By Comparable Medical Conditions.

1. Basic Title VII Principles Prohibit Preferential Treatment of Employees On The Basis Of Sex.

The Civil Rights Act of 1964 is the most comprehensive federal civil rights legislation ever enacted. Passed against the backdrop of pervasive discrimination in many segments of society, the various titles of the Act were designed to bring an end to discrimination in public accommodations, access to public facilities, federally assisted programs and employment.

Title VII of the 1964 Act, which addresses the problem of employment discrimination, broadly mandates equality of employment opportunity and treatment. Under Section 703(a), 42 U.S.C. § 2000e-2(a), it is an unlawful employment practice for an employer to discriminate against any individual with respect to conditions of employment "because of such individual's race, color, religion, sex, or national origin," or to classify employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" based upon any of the prohibited bases.

The statute's sweep is broad and unambiguous: the obligation imposed by Title VII is to provide equal employment opportunities and treatment for every employee *without regard* to race, color, religion, sex or national origin. *See Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579 (1978). Congress' objective was to remove barriers that had operated to favor one group of employees over another based upon immutable characteristics. Qualifications for the job or the ability to perform the work were to be the touchstones of hiring, firing and other conditions of employment, rather than race or sex. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971).

The law that Congress ultimately passed declared that *all* classifications based upon characteristics such as race or sex "tend to preserve traditional assumptions about

groups rather than thoughtful scrutiny of individuals" and are therefore invidious, destructive and unlawful. *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 709 (1978). Because accommodations for, or special treatment of, any individual or group based upon characteristics such as race or sex foster harmful stereotypes, the remedy that Congress selected was designed to make those characteristic "*irrelevant* in the employment market." *Id.* (emphasis added).

Title VII thus recognizes that preferential treatment, even for groups that had been the victims of past discrimination, is generally understood as "reinforc[ing] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *University of California Regents* v. *Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.). If race or sex is a relevant employment-related criteria, notions of entitlement on those grounds will be fostered and private discrimination encouraged. *See Hughes* v. *Superior Court*, 339 U.S. 460, 463-64 (1950). Preferences also engender animosity and discontent among members of the disfavored group. *Fullilove* v. *Klutznick*, 448 U.S. 448, 532-33 (1980) (Stevens, J., dissenting).

Therefore, as this Court held in *Griggs* v. *Duke Power Co.*, 401 U.S. at 431, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." For example, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976), the Court declared that Title VII protects whites as well as blacks from employment discrimination, and in *Newport News* the Court reaffirmed the principle that men as well as women are protected from discrimination on the basis of their sex. 462 U.S. at 684-85. In short, as the Court articulated in *McDonald*, Title VII was intended to cover " 'all Americans.' " 427 U.S. at 280.

The legislative history of Title VII is replete with strong and unequivocal statements that the law was intended to require that employment decisions be made on merit rather than on stereotypes, prejudices or preferences. "The Bill would do no more than prevent . . . employers from discriminating against *or in favor* of workers because of their race, religion or national origin." 110 Cong. Rec. 1518 (1964) (remarks of Rep. Celler) (emphasis added); "Employers and labor organizations could not discriminate *in favor of* or against a person because of his race, his religion or his national origin. In such matters . . . the bill now before us . . . is colorblind," *id.* at 6564 (remarks of Sen. Kuchel) (emphasis added); "Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by Title VII of this bill." *Id.* at 8921 (remarks of Sen. Williams); *see also id.* at 7247 (remarks of Sen. Case).[8]

In sum, Title VII prohibits the employment of men, as well as women, under terms and conditions less favorable than those accorded similarly situated members of the opposite sex and, conversely, forbids preferential treatment of either men or women on the basis of their sex.

---

[8] The key Title VII principle was perhaps best summarized by Senator Humphrey, the moving force behind the bill in the Senate, when he stated that:

> The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other person or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, *the title would prohibit preferential treatment for any particular group*, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.

110 Cong. Rec. at 11848 (emphasis added).

2. The PDA Does Not Alter Title VII's Basic Principles.

Contrary to what the court of appeals suggested (Pet. App. A-8 to A-11 and n.7), the PDA does not alter Title VII's guiding principle that equality of employment opportunity necessitates equal treatment of employees whatever their race, color, religion, sex or national origin.

The impetus for the PDA was Congress' disagreement with the Court's decision in *General Electric Co.* v. *Gilbert*, *supra*. Before *Gilbert*, the unanimous conclusion of the six courts of appeals that had addressed the issue was that disparate treatment of employees on the basis of pregnancy was sex discrimination under Title VII. *See* 429 U.S. at 147. Rejecting the analysis in those cases, the Court in *Gilbert* held that discrimination on the basis of pregnancy was *not* "sex discrimination" within the meaning of Title VII.

At issue in *Gilbert* was the legality of a disability plan that provided employees with weekly compensation during periods of disability resulting from nonoccupational causes, but which excluded from eligibility for such benefits disabilities arising from pregnancy. Noting that Title VII does not define the term "discrimination," the Court in *Gilbert* applied an analysis derived from equal protection cases—in particular, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), which had upheld the constitutionality of the pregnancy exclusion in the State of California's disability insurance plan. 429 U.S. at 133-35. The Court in *Geduldig* held that by excluding pregnancy coverage from its disability program, the state was not guilty of discrimination on the basis of gender as the "program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." 417 U.S. at 496-97 n.20.

Applying the *Geduldig* reasoning to Title VII, the Court in *Gilbert* stated that "[s]ince it is a finding of sex-based

discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice . . ., *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not gender-based discrimination at all." 429 U.S. at 136.

The dissenting Justices strongly disagreed. As Justice Stevens analyzed the question, the exclusion of pregnancy from the employer's disability insurance coverage put pregnancy in a class by itself, which "[b]y definition . . . discriminates on account of sex" as "it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 161-62. Justice Brennan, pointing to the basic Title VII policies involved, stated, "pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force." *Id.* at 158.

Congress enacted the PDA specifically to overrule the interpretation given Title VII by the *Gilbert* majority, and thereby to define discrimination on the basis of pregnancy as prohibited sex discrimination within the meaning of Title VII. The PDA was *not* enacted to provide special protection or benefits for pregnancy. Rather, the measure ensures that the provisions of Title VII that make it unlawful to discriminate on the basis of sex, and that make gender an irrelevant consideration in employment relations, apply equally to discrimination on the basis of pregnancy. As the following discussion conclusively demonstrates, the language and structure of the PDA, its legislative history, the contemporaneous interpretation of the PDA by the Equal Employment Opportunity Commission ("EEOC"), and the reasoning of this Court in *Newport News* are all entirely antithetical to the Ninth Circuit's holding that the PDA implicitly endorses state laws that discriminate in favor of pregnancy.

a. The language of the PDA is clear and unambiguous.

The starting place for any analysis of the PDA is, of course, the statute itself, as the statutory language most accurately expresses the legislative purpose. *See Park 'n Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 105 S. Ct. 658, 662 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984). "If the statute is clear and unambiguous 'that is the end of the matter, for the court, . . ., must give effect to the unambiguously expressed intent of Congress.' " *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986) (quoting *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *see also Caminetti* v. *United States*, 242 U.S. 470, 490 (1917).

The language of the PDA contains no suggestion of an intent by Congress to depart from basic Title VII principles and to treat discrimination on the basis of pregnancy different from other forms of gender-based discrimination. The PDA merely clarified Title VII's definition of sex discrimination by adding the following subsection to Section 701, the general "Definitions" section of Title VII:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, . . .

The first clause of Section 701(k) provides the Title VII standard to be applied to employment practices or policies involving pregnancy: discrimination "because of pregnancy, childbirth, or related medical conditions" is discrimination "because of sex." As Senator Williams explained when introducing the Senate bill (S. 995) that ultimately became the PDA, the legislation "explicitly provide[s] that the term 'sex discrimination' within the meaning of the act includes discrimination based on 'pregnancy, childbirth or related medical conditions.' " 123 Cong. Rec. 7540 (1977), reprinted in Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978, at 3 (Comm. Print 1980) (hereinafter, "Leg. Hist."). This broad statement of principle plainly indicates that discrimination among employees resulting from the different treatment of pregnancy-related conditions was intended to constitute sex discrimination prohibited by Title VII.

While the first clause of the PDA is clear and straightforward, the second clause removes any room for doubt by explaining the effect of the first clause. It states that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . ." The second clause plainly and simply means that pregnancy, to the extent it creates or results in a disability affecting an employee's ability to work, is to be treated in the same manner as other conditions resulting in some temporary incapacity to work.

Taken together, the first and second clauses effectuate Congress' intent to overrule the underlying rationale of *Gilbert* "that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions." S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977), Leg. Hist. at 41. The language selected by Congress is unusually clear and unambiguous. The words selected are not susceptible to the inference that Congress intended anything more than to make discrimination on the basis of pregnancy unlawful sex discrimination under Title VII.

Nothing in the language of the PDA suggests that preferential treatment of pregnant female employees is not discrimination "on the basis of sex" and therefore prohibited by Title VII. The statute does *not* state that women affected by pregnancy may be extended employment benefits greater than those extended to employees affected by other medical conditions, or that discrimination *in favor* of pregnant employees is permissible, while discrimination *against* pregnant employees is unlawful. The PDA provides that "for all employment-related purposes" the test of discrimination is whether employees affected by pregnancy are treated in the *same* manner as employees "not so affected but similar in their ability or inability to work."

b. The legislative history of the PDA reinforces the plain meaning of the statute.

It is not necessary to examine a statute's legislative history when Congress' words are clear and when the context and framework within which a law was enacted support the plain meaning of the language chosen. *See, e.g., Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961). While that exercise therefore seems particularly unnecessary here in light of Congress' unusual clarity of expression, the legislative history of the PDA adds abundant additional evidence that the PDA was intended only to make pregnancy discrimination the equivalent of sex discrimination and thereby to require equality of treatment between similarly situated pregnant and non-pregnant workers.

In identifying the purpose of the legislation, the House Committee Report explicitly recognized that enactment of the PDA

> will reflect no new legislative mandate of the Congress nor effect changes in practices, costs, or benefits beyond those intended by Title VII of the Civil Rights Act. On the contrary, the narrow approach utilized by the bill is to eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination.

H.R. Rep. No. 948, 95th Cong., 2d Sess. 3 (1978), Leg. Hist. at 149-50.

The House Committee Report stressed that the legislation did not mark a departure from Title VII principles.

> *It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment.* . . . [I]t does not require employers to treat pregnant employees in any particular manner. . . . H.R. 6075 in no way requires the institution of any new programs where none currently exist. *The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.*

H.R. Rep. No. 948, *supra*, at 4; Leg. Hist. at 150 (emphasis added). The Senate Committee Report similarly reflects an unambiguous intent that pregnancy disabilities be treated in the same manner as other disabilities:

> By defining sex discrimination to include discrimination against pregnant women, *the bill rejects the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability to other conditions.* Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the *same* conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the *same*

> rights, leave privileges and other benefits, as other workers who are disabled from working.

S. Rep. No. 331, *supra* at 4, Leg. Hist. at 41 (emphasis added).

The concept of a "floor" for pregnancy benefits, but not a "ceiling," as discerned by the Ninth Circuit from the PDA, is not to be found in the legislative history. The committee reports could not have been clearer in describing the purpose of the PDA: the legislation was being proposed only to place the condition of pregnancy under the ambit of Title VII's prohibition of sex discrimination and the goal in doing so was to equate pregnancy with other conditions similarly affecting the ability to work. The PDA makes distinctions based upon pregnancy, "*per se* violations of Title VII," and subjects those distinctions "to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute." H.R. Rep. No. 948, *supra*, at 3-4; Leg. Hist. at 149-50.

The proponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment, including, but not limited to, pregnant women workers.

> The hallmark of title VII, and of this legislation, is that it would require that all American workers be treated fairly by their employers, without regard to their sex, except insofar as it would affect their ability or inability to work.

123 Cong. Rec. at 29652, Leg. Hist. at 103 (remarks of Sen. Williams).

> The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work. The key to compliance in every case will be equality of treatment. In this way, the law will protect women from the full range of

> discriminatory practices which have adversely affected their status in the work force.

123 Cong. Rec. at 29385, Leg. Hist. at 62-63 (remarks of Sen. Williams). *See id.* at 29645, Leg. Hist. at 83 (remarks of Sen. Stafford); 124 Cong. Rec. 29652 (1978), Leg. Hist. at 203 (remarks of Sen. Javits).[9]

As noted earlier, the PDA was a direct response to this Court's decision in *Gilbert* and was intended to overrule what Congress viewed to be an erroneous interpretation of Title VII. In the committee reports and throughout the floor debates, the proponents of the PDA observed that "the bill merely is reestablishing the law as it was understood prior to *Gilbert*," and that the dissenting opinions in *Gilbert* correctly reflected Congress' original intent in enacting Title VII.[10] And it was the interpretation of the dissenting Justices that Congress enacted into law.

The dissenters in *Gilbert* had explained that it is facially discriminatory for an employer to devise "a policy that, but for pregnancy, offers protection for all risks, even those that are 'unique to' men or heavily male dominated." 429 U.S. at 160 (Brennan, J., dissenting). Justice Stevens observed that distinctions based upon pregnancy did not, as the majority had suggested, just discriminate between those who were pregnant and those who were not, but

---

[9] Although these statements were made in the context of a legislative effort to eliminate pregnancy as an occasion for invidious discrimination, and the question of prohibiting preferential treatment on the basis of pregnancy was not a prominent concern, "[t]his does not create a 'negative inference' limiting the scope of the [PDA] to the specific problem that motivated its enactment." *Newport News*, 462 U.S. at 679; *see United States* v. *Turkette*, 452 U.S. 576, 591 (1981). As discussed above, Congress announced a general principle outlawing any difference in treatment on the basis of pregnancy for any employment-related purpose. That principle should be applied according to its terms.

[10] *Newport News*, 462 U.S. at 678-79 & n.17; *see, e.g.*, 123 Cong. Rec. at 8144, Leg. Hist. at 18 (remarks of Sen. Bayh).

"between persons who face a *risk* of pregnancy and those who do not." *Id.* at 161-62 n.5 (emphasis added). The dissenting Justices concluded that the plan in *Gilbert* violated Title VII because pregnancy or the risk of pregnancy affected only women, and the exclusion of pregnancy from the coverage of the plan impermissibly allocated benefits on the basis of the employee's sex. The dissenting Justices believed that Title VII prohibited the *sui generis* treatment of pregnancy.

Thus, contrary to the premise implicit in the Ninth Circuit opinion, Congress did not intend the PDA to shield pregnant workers from the non-discriminatory consequences of neutral employment policies. The legislative history makes it clear that women affected by pregnancy are to be treated the same as other employees based upon ability or inability to work. Pregnant employees cannot be put in a class by themselves simply because it is pregnancy rather than some other medical condition that affects their ability to work.[11]

Indeed, Congress expressly sought to "demystify" pregnancy as a workplace factor.

---

[11] In this regard, Congress noted that in deciding *Gilbert* the Court had rejected the EEOC's Title VII Guidelines, which Senator Bayh described as requiring that " 'employment policies and practices shall be applied to disabilities due to pregnancy or childbirth on the same terms and conditions as they apply to other temporary disabilities.' " 123 Cong. Rec. at 29641, Leg. Hist. at 18. The Senate Report comments that:

> Those guidelines made clear that excluding applicants or employees from employment because of pregnancy or related medical conditions was a violation of title VII, and specifically required employers to treat disabilities caused or contributed to by pregnancy or related medical conditions as all other temporary disabilities. In the committee's view *these guidelines rightly implemented the Congress' intent in barring sex discrimination in the 1964 act.*

S. Rep. No. 331, *supra*, at 2, Leg. Hist. at 39 (emphasis added).

> [T]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs. H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and *specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.*

H.R. Rep. No. 948, *supra*, at 3 (1978), Leg. Hist. at 149 (emphasis added). During the Senate debate, Senator Brooke was emphatic on this point:

> And I would emphasize most strongly that S. 995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men.

123 Cong. Rec. at 29664, Leg. Hist. at 135. *See also id* at 7540, Leg. Hist. at 3-4 (remarks of Sen. Williams; *id.* at 29387, Leg. Hist. at 67 (remarks of Sen. Javits).

Congress thus rejected an approach that would allow pregnant employees to be singled out and treated in a special manner. It did *not* enact a law designed to "protect" women workers based upon a stereotypical assumption that women are in need of special protection.[12]

---

[12] Prior to the enactment of Title VII, women were frequently "protected" by state laws due to their child-bearing function. Shortly after the turn of the century, this Court wrote:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of

c. The EEOC has interpreted the PDA as barring different treatment based upon the condition of pregnancy.

The EEOC, the agency charged with administration of the federal anti-discrimination laws, has expressly addressed the question whether the PDA permits preferential treatment of women. After the enactment of the PDA, the EEOC revised its "Guidelines on Discrimination Because of Sex" and issued "Questions and Answers on the Pregnancy Discrimination Act." 29 C.F.R. Part 1604 and Appendix. As interpreted by the EEOC, "[t]he basic principle of the [PDA] is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work." 29 C.F.R. Part 1604 (Appendix) (Introduction).

> motherhood are upon her .... [*S*]*he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained*.... [H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her ....

Muller v. *Oregon* 208 U.S. 412, 421-22 (1908) (emphasis added).

For decades, the view that, because of their unique biological function, women should be placed in a "class apart" resulted in their relegation to the now-notorious "gilded cage." This Court has in more recent times rejected the "old notion" that women are "destined for solely the home and rearing of families" and that men are primarily responsible "for providing the home and its essentials." *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975). As noted by the Court in *Orr v. Orr*, 440 U.S. 268, 283 (1979), "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." The PDA was designed to free women from arbitrary job discrimination based upon pregnancy so that they can compete on an equal basis in the job market. *E.g.*, 123 Cong. Rec. at 29387, Leg. Hist. at 67-68 (remarks of Sen. Javits).

Consistent with that understanding of the PDA, the revised Guidelines expressly provide that policies or practices involving reinstatement and duration of leave must afford the same treatment to employees affected by pregnancy as is afforded to employees disabled by other medical conditions.

> Written or unwritten employment policies and practices ... shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.

29 C.F.R. § 1604-10(b). Question No. 9 of the EEOC's "Questions and Answers" specifically addresses the reinstatement issue:

> Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?
>
> A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

29 C.F.R. Part 1604 (Appendix).[13]

---

[13] The other EEOC Questions and Answers also demonstrate that the treatment required of pregnancy-related disabilities must be the same as the treatment of other kinds of disabilities. *See, e.g.*, Question and Answer No. 10 ("employer's seniority policy must be the same"); Question and Answer No. 16 ("benefits for long-term disabilities ... must be provided to the same extent"); Question and Answer No. 18 ("employer must provide same benefits for those on leave"); Question and Answer No. 22 ("level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees"). 29 C.F.R. Part 1604 (Appendix).

The same point is made in the EEOC Compliance Manual, prepared by the EEOC to provide guidance to its staff in enforcing Title VII.

> Although *an employer is not required to hold open for any specified period of time the job of an employee on leave of absence for pregnancy-related reasons*, the employer may not treat her less favorably than it treats other employees seeking to return to work after comparable absences for nonpregnancy reasons.

EEOC Compliance Manual, § 676.4, "Right to Work," reprinted in EEOC Compliance Manual (CCH) ¶ 4804 (12-83) (emphasis added).

The EEOC has successfully defended its view that preferential treatment of pregnant employees violates the PDA in the same manner as discrimination against pregnant employees. In *Kansas Association of Commerce and Industry* v. *EEOC*, 33 FEP Cases 588 (D. Kan. 1983) the district court declared:

> We must agree with the defendant [EEOC] that a provision of extended benefits for pregnancy only by an employer violates Title VII's basic ban on sex discrimination, by extending greater protection to women than to men.

Id. at 593.

As the agency primarily charged by Congress with the interpretation and administration of the statute, the EEOC's construction of the PDA is entitled to great weight. *E.g.*, *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Indeed, its interpretation should not be set aside absent " 'compelling indications that it is wrong.' " *Miller* v. *Youakim*, 440 U.S. 125, 144-45 n.25 (1979), *quoting Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). Here, the EEOC's interpretation is

not only reasonable, but is the only permissible reading of the PDA and its legislative history.

d. *Newport News* supports the position that Title VII and the PDA require that pregnant employees be treated the same as similarly situated non-pregnant employees.

This Court has examined closely the intention behind and significance of the PDA only in *Newport News*. While the decision in *Newport News* seems unambiguous, it was relied upon in this case both by the district court to strike down California's pregnancy disability law and by the appellate court to uphold it.

The district court cited *Newport News* for the proposition that "[d]iscrimination against males based on pregnancy is discrimination based on sex under Title VII" (Pet. App. E-14), and held that California employers who comply with the California pregnancy disability law violate Title VII because the state law makes or tolerates disability leave benefits based upon the condition of pregnancy. *Id.*

The Ninth Circuit interpreted *Newport News* as standing for exactly the opposite principle. Reacting to the district court's decision that the California pregnancy law discriminates against men based on pregnancy, the Ninth Circuit declared: "*Newport News* stands for no such thing." (Pet. App. A-4). According to the Ninth Circuit, in enacting the PDA "Congress intended to reverse *Gilbert*, to require employers to include pregnancy disability leave in their otherwise comprehensive benefit packages, ..." (*Id.* at 10). Consequently, "Title VII does not preempt a state law that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with, nor unlawful under, Title VII." (*Id.* at 11). *Newport News* is not to the contrary, the court of appeals stated, because the decision there "extended a pregnancy benefit, while Cal Fed seeks to limit one." (*Id.* at 5).

Unless there is some hidden meaning in this Court's explanation of its analysis of the PDA, the Ninth Circuit seriously misread the decision in *Newport News*. This Court declared in *Newport News* that (1) the PDA requires employers to treat pregnancy like other comparable temporary disabilities, rather than as a unique and peculiar condition with its own set of rules, and (2) the failure to deal with the condition of pregnancy on a par with other conditions violates Title VII, regardless whether the victims of the discrimination are male or female or whether the discrimination favors or harms pregnant female employees. 462 U.S. at 680-85.

The employer in *Newport News* had a health insurance plan for employees, spouses and dependents that limited coverage for pregnancy. In response to the enactment of the PDA, these limitations were lifted for female employees, but retained for spouses of employees and other dependents. 462 U.S. at 670-72. A male employee, later joined by a labor union, filed a charge of discrimination with the EEOC alleging that the plan violated Title VII. The employer then sued the EEOC, the male employee and the union, seeking declaratory and injunctive relief.

This Court held that the revised health plan violated Title VII, as amended by the PDA, because, on the one hand, it offered comprehensive medical insurance benefits to spouses of female employees and, on the other, benefits to the spouses of male employees which restricted the benefits available for one major category of medical costs which they were likely to encounter. 462 U.S. at 683-85. Because pregnancy is to be treated like any other comparable medical condition under the PDA, the Court concluded that it was discriminatory for an employer to offer a medical insurance plan to employees that restricts spousal coverage for male employees by excluding the very medical condition that Congress determined may not be treated *sui generis*. *Id.* at 684.

It is difficult to reconcile the holding and reasoning of *Newport News* with the Ninth Circuit's reading of the decision. The *Newport News* Court stated unequivocally that the PDA was intended by Congress to overrule both the decision *and* the reasoning of *Gilbert* and to endorse the interpretation of Title VII articulated by the dissenters in *Gilbert*. 462 U.S. at 676-79. The Court in *Newport News* reviewed the legislative history of the PDA in detail and stressed that the PDA was simply a part of Title VII and was to be construed consistent with basic, existing *"Title VII principles."* *Id.* at 680 n.20, 683 n.23 (emphasis added). The Court stated that the PDA "did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female." *Id.* at 675 n.11; *see also id.* at 682.

> By making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee's sex.

Id. at 685, *see also Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1084-85 n.14 (1983) ("the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles, [therefore Congress decided] to forbid special treatment of pregnancy. . . ." (Opinion of Marshall, J.). The employer in *Newport News* was held to be in violation of Title VII, as amended by the PDA, because it afforded less comprehensive benefits to its male employees than to its female employees.

The Ninth Circuit also misconstrued this Court's reaffirmation in *Newport News* of the principle that increased cost is not a defense to mandated equal treatment with respect to employment benefits. 462 U.S. at 685 n.26; *see Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 716-17. The court of appeals held that there

is "no principled reason to distinguish pregnancy disability days, ... from the pregnancy disability dollars in *Newport News*." (Pet. App. A-10). The court failed to recognize, however, the critical distinction between requiring *equal* treatment of males and females despite the fact that the associated costs to an employer may be greater for one sex, and requiring perferential treatment with associated greater costs for the preferred sex.

The *Newport News* Court, *quoting Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 711, concluded that the "*simple test*" of Title VII is that a practice is unlawful if it deals with an individual " 'in a manner which but for that person's sex would be different.' "[14] 462 U.S. at 683. The PDA requires that the word "pregnancy" be substituted for the word "sex" in the

---

[14] In upholding the California pregnancy disability law against petitioners' Title VII preemption challenge, the Ninth Circuit stated (Pet. App. A-11 n.7) "that the goal of Title VII is equality of employment opportunity, not necessarily sameness of treatment," citing for support *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979). But *Weber* has little relevance to the issue here.

In *Weber*, the Court upheld a voluntary affirmative action plan that did not involve the coercive power of the state or federal government, but which was *voluntarily* adopted by the employer (pursuant to the collective bargaining agreement covering terms and conditions of employment), was temporary in nature, and did not unnecessarily hamper the interests of white employees. 443 U.S. at 2729-30. Based upon those considerations, the Court concluded that the preference at issue there fell "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 209.

Here, on the other hand, the disability leave preference for pregnant workers is not voluntary, but imposed by state law; is not temporary, but permanent; and diminishes the interests of non-pregnant workers as there is no basis to believe that the compelled preference is necessary to eliminate a conspicuous disadvantage that pregnant workers would sustain in its absence (*see* pp. 36-41, *infra*).

foregoing equation. ("The [PDA] has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Id.* at 684.) Thus, under *Newport News*, fringe benefits plans or leave policies that are uniform except in the case of pregnancy constitute *per se* violations of Title VII.

Thus, the Ninth Circuit's view that the PDA was intended to grant benefits to or protection for pregnant employees, apart from the right to equality of treatment with employees experiencing comparable medical conditions, is neither supported by *Newport News* nor supportable in the face of *Newport News*. There is nothing in *Newport News* to suggest that the Court believed that by enacting the PDA Congress intended to depart from the basic Title VII principles prohibiting preferential treatment on account of an employee's race, sex, national origin or religion. There is certainly no trace of a suggestion in *Newport News* that the Court believed that the PDA makes pregnancy a legislatively favored classification. To the contrary, the entire thrust, reasoning, rationale and language of the *Newport News* decision compels precisely the opposite conclusion.

B. The California Pregnancy Disability Law Is Preempted By Title VII.

1. Conflicting State Laws Are Preempted By Title VII.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, Congress may preempt state laws in any area properly the subject of federal regulation. A state law may be preempted by federal legislation in various ways. First, when Congress has decreed that "its enactments alone are to regulate a part of commerce," all state laws regulating the same area must fall whether or not they conflict with the federal statute. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Preemption of all state law

in the area "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. at 525; *accord Fidelity Federal Savings & Loan Assn.* v. *De La Cuesta*, 458 U.S. 141, 153 (1982).

Second, even when Congress has not occupied the entire field and has left some role for state regulation of specific subject matter, state law is nonetheless preempted if Congress has expressly forbidden certain types of state legislation. *See, e.g., Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 12 (1983). The appropriate inquiry is whether the state law at issue falls within the category of preempted state legislation without regard to whether it conflicts with the federal statute. *Id.* at 12 nn.5 & 6.

Finally, when Congress has neither occupied the entire field nor expressly precluded certain kinds of state regulation, a state statute may be still preempted if it conflicts with federal law. *Jones* v. *Rath Packing Co.*, 430 U.S. at 525-26. Such conflicts between state and federal law occur whenever "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), or whenever the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). In this regard, the Court must "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones* v. *Rath Packing Co.*, 430 U.S. at 526.

The second type of preemption, coupled with the principles of the third type, is involved here. In enacting Title VII, Congress did not intend to occupy the field of employment discrimination to the exclusion of compatible state laws. The states are generally free to legislate with respect to employment discrimination matters. *See Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85, 101-03 (1983). Congress did, however, intend to foreclose state regulation of employment discrimination in a manner inconsistent with federal law. Accordingly, Section 1104 of Title XI of the Civil Rights Act of 1964, specifically states that the provisions of the various titles of the 1964 Civil Rights Act should not be construed as displacing state laws on the same subject, except for state laws inconsistent with any provision or "any of the purposes of the [1964] Act." 42 U.S.C. § 2000h-4. And, in more explicit language, Section 708 of Title VII preempts any state law "which purports to *require* or *permit* the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7 (emphasis added).

2. The California Pregnancy Disability Law Is Inconsistent With And Thus Preempted by Title VII.

In light of the purposes of the PDA and the clear statement of preemptive intent contained in Sections 708 and 1104, the California pregnancy disability law must be invalidated. The state law announces a policy of preferential treatment for pregnant female employees that cannot be harmonized with Title VII's basic principles and the PDA's extension of those fundamental tenets to discrimination on the basis of pregnancy.

An employer that changed its disability leave policy to comply with the California requirement would place itself out of harmony with the anti-discrimination standard imposed by Title VII, as amended by the PDA, that "for all employment-related purposes" pregnant women shall "be treated the same" as other persons not so affected but "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). For example, petitioner Cal Fed could comply fully with the California pregnancy disability law by abandoning its facially neutral disability leave policy—which treats all disabled employees the same—in favor of a facially discriminatory practice that provides leave and guaranteed reinstatement rights only to pregnant employees and that denies the same rights to employees unable to

work due to other medical conditions. That, however, is the very sort of preferential and discriminatory employment practice that this Court condemned in *Newport News* as violative of Title VII.[15]

In short, the California pregnancy disability law is inconsistent with the purposes of Title VII, as amended by the PDA, which calls for the evenhanded treatment of employees disabled by pregnancy and other employees not so affected "but similar in their ability or inability to work." The state law, consequently, "requires" or "permits" an employment practice unlawful under Title VII—the provision of a disability leave package that disfavors nonpregnant employees. The California pregnancy disability law is therefore preempted by both Section 1104, 42 U.S.C. § 2000h-4, and Section 708, 42 U.S.C. § 2000e-7.

3. The California Pregnancy Disability Law is Not Defensible Under Any Recognized Disparate Impact Analysis.

Title VII has been held to proscribe not only those employment practices that overtly discriminate on the basis of impermissible characteristics but also those that, although neutral in form, have a disproportionately adverse effect on a statutorily protected group and cannot be justified by business necessity. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. at 430-32. Practices of the first kind, where the employer intentionally treats some employees less favorably because of their race, color, religion, sex or national origin, are said to involve "disparate treatment," while facially neutral em-

[15] The federal courts have held other provisions of California law giving preferences to women to be inconsistent with and thus preempted by Title VII. *See Homemakers, Inc. of Los Angeles* v. *Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), (payment of premium overtime to women employees), *cert. denied*, 423 U.S. 1063 (1976); *Burns* v. *Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal. 1972) (rest breaks only required for women).

ployment practices that fall more harshly on a protected group are commonly referred to as having a "disparate impact." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 335-36 n.15.

Although the court of appeals did not uphold the California statute on the theory that it was a proper legislative response to policies having a disparate impact (Pet. App. A-6 to A-7), respondents persist in asserting[16] that the California pregnancy disability law is not repugnant to, but complements Title VII, as amended by the PDA, because it allegedly eliminates the disparate impact on pregnant employees produced by inadequate disability leave policies. But the conflict created by the squarely inconsistent requirements of the California pregnancy disability law and the federal statute is not cured by a disparate impact analysis.

Assuming that the disparate impact model is even appropriate under the PDA,[17] there is no basis in the record to support its application here. To prevail on a disparate impact claim, a plaintiff must show that a specific neutral employment practice produces a statistically significant adverse affect on a protected group of employees. *See, e.g., Dothard* v. *Rawlison*, 433 U.S. 321, 329 (1977). Accordingly, respondents would have to establish how many employees lose their jobs when neutral disability leave policies do not provide for guaranteed reinstatement, and, most importantly, that the burden of such facially neutral policies falls, at an appropriate level of statistical significance,

[16] *See* Respondent's Brief in Opposition to Petition for Writ of Certiorari ("Br. in Opp.") at 17-19.

[17] The House Committee Report notes that "[b]y making clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need in most instances to rely on the [disparate] impact approach, ..." H.R. Rep. No. 948, *supra*, at 3, Leg. Hist. at 149.

more heavily on women employees as a result of pregnancy than on male employees.

The record in this case, however, is barren of any evidence supporting respondents' claims that a disability leave policy which does not provide up to four months of leave with reinstatement rights adversely affects to a significant extent either pregnant workers or women employees.[18] Compliance with California's pregnancy disability law is mandatory whether or not the employer's disability leave policy has disparate impact. Absent any demonstration that California's enactment was addressed to a legitimate disparate impact problem, respondents' effort to defend the statute on this ground appears to be little more than an afterthought.[19]

In fact, there is no basis to believe that pregnant women will be disadvantaged by neutral disability plans that do

---

[18] The only statistics respondents offer is that "[m]ore than 80 percent of working women are in their prime child-bearing years, and 93 percent of these women are likely to have at least one child during their working lives." Br. in Opp. at 17 n.7. Respondents' reliance on those unremarkable statistics is somewhat curious because virtually all that they demonstrate is the biological fact that only women can become pregnant.

The issue here, however, is whether a disability leave policy that treats pregnancy the same as other disabling medical conditions produces a statistically significant disparate impact on female workers. On this crucial point respondents are silent.

[19] There is no basis in the record for suggesting that Cal Fed's disability leave policy is anything like the policy considered in *Abraham* v. *Graphic Arts International Union*, 660 F.2d 811 (D.C. Cir. 1981). In *Abraham*, the employer's disability leave policy allowed for a maximum of ten days of sick leave. Consequently, a pregnant worker lost her job when she took pregnancy leave as a ten-day leave "falls considerably short of the period generally recognized in human experience as the respite needed to bear a child." 660 F.2d at 819 (footnotes omitted). Respondents do not maintain that Cal Fed's policies have a disparate impact on women, but claim only that those policies fall short of California's arbitrary standards.

not comply with the California pregnancy disability law.[20] For example, while statistics of this nature are subject to widely divergent interpretations, during the principal childbearing years for women (ages 17-44), men of the same age lost almost twice as many days from work from all kinds of injuries as did working women.[21] Men are statistically more likely than women to become disabled for work-related illness and injury.[22] Women past the childbearing years, are generally less vulnerable than men to various disabling conditions.[23]

---

[20] It may be that some employers within the state have disability leave policies, like the employer in *Abraham* (*see* note 19, *supra*), that will result in disparate impact on women. By lumping those employers together with employers whose facially neutral disability leave practices do not fall more harshly on women, the state statute benefits nonvictims and victims of discrimination equally. Title VII, however, only authorizes relief to actual victims of discrimination. *Firefighters Local Union No. 1784* v. *Stotts*, 104 S. Ct. 2576, 2588-89 (1984) (Title VII policy is to provide relief "only to these who have been the actual victims of discrimination. . . ."). By providing a remedy where none is needed, the California pregnancy disability law causes the very discriminatory treatment that Title VII and the PDA were designed to eliminate.

[21] 128.9 days per year were lost due to injuries per 100 currently employed men, while only 68.8 days per year were lost due to injuries per 100 currently employed women. M. Rudov and N. Santangelo, *Health Status of Minorities and Low Income Groups*, DHEW Pub. No. (HRA) 79-627 (1979), p. 155.

[22] Men experience 65% of all job-related injuries and job-related diseases. U.S. Department of Commerce, Bureau of the Census, *Labor Force Status and Other Characteristics of Persons with a Work Disability:* 1982, Table E, p.4. In 1976, in New York State, only 20% of all workers' compensation cases involving occupational injury or illness involved women. Washington, *The Special Health Hazards for Women at Work with an Emphasis on Stress*, 14 The Forum 503, 515 (1979).

[23] For example, in the age group 45-54, 21.2 men per 100 had hypertensive heart disease compared to 12.1 women per 100 in the same age group. Hypertension and Hypertensive Heart Disease in Adults, National Center for Health Statistics, DHEW Publication No. (HRA) 74-1882, *Vital and Health Statistics*, Series 11, No. 13, Table 2.2. One

Respondents have offered no support for the premise implicit in their argument that women, because they become pregnant, are disabled more frequently and for longer periods than men. In fact, Congress had before it when debating the PDA at least some evidence indicating that the contrary may well be true. During the debate on the PDA, Representative Akaka noted the experience of the State of Hawaii, which since 1973 provided insurance coverage to employees suffering temporary disabilities, including disabilities arising from pregnancy.

> Another concern I have heard expressed is that the average duration of women's compensated disabilities will greatly increase when employers include pregnancy disabilities in their plans. Again, the Hawaii experience indicates this problem is unlikely to materialize. In 1975, the average duration figure for women actually was lower than that for men, even though pregnancy disabilities were included in the calculations. The average duration for men was 5.1 weeks; the average duration for women was only 4.4 weeks.

124 Cong. Rec. at 21439, Leg. Hist. at 178.[24]

---

commentator, after reviewing the current medical literature, concluded that there are non-reproductive biological differences between males and females that explain the substantial variance in occupational disability due to disease or injury between male and female workers. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 Mich. L. Rev. 1379, 1391-92 (1983).

[24] *See also Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 1st Sess. 381 (1977) (statement of Patricia K. Putnam, Associate Dean for Legal and Legislative Affairs, John A. Burns School of Medicine of the University of Hawaii). Ms. Putnam also noted that:

> It is true that there are overall more claims by women employees than by men employees, but *the underlying cause of that is not their status as a woman, but it is their low-income job.* [sic] Because people who have low-income jobs are disabled more frequently and generally for longer periods than those who have high incomes.

Id. at 374 (emphasis added).

Thus, based upon a stereotypical and unsupported assumption about women and pregnancy, respondents are urging this Court to uphold the California pregnancy disability law on the theory that special treatment is necessary to protect women from the unproven disparate impact of neutral disability leave policies. But Title VII does not authorize remedial action in the absence of proof confirming the asserted effect of such policies. As the district court said in *Marafino* v. *St. Louis County Circuit Court*, 537 F. Supp. 206, 213 (E.D. Mo. 1982), *aff'd on other grounds*, 707 F.2d 1005 (8th Cir. 1983):

> [T]he Court simply cannot imagine a disparate impact . . . . In the total absence of any evidence that women do in fact request lengthy leaves of absence more frequently than men, the Court cannot conclude that disparate impact has been shown.

(Citation omitted).

Even if female employees did suffer disproportionately from disability leave policies that lack guaranteed reinstatement rights, California's solution is itself improper under Title VII. The remedy for a facially neutral policy that has a disproportionate adverse affect on pregnant women is not a regime that permits, encourages or imposes disparate treatment of non-pregnant employees.

The basic policy of Title VII requires that the courts "focus on fairness to individuals rather than fairness to classes." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. at 709. " '[E]ven a true generalization about [a] class cannot justify class-based treatment.' " *Arizona Governing Committee* v. *Norris*, 463 U.S. at 1084. Title VII

does not permit a facially discriminatory policy, like that imposed by the California pregnancy disability law, to deprive an individual of his rights to equal treatment because other persons of his sex may have in the past benefited from the adverse impact on others of a facially neutral policy. "Every *individual* employee is protected against *both* discriminatory treatment and 'practices that are fair in form, but discriminatory in operation.' " *Connecticut* v. *Teal*, 457 U.S. 440, 455-56 (1982). (emphasis added).

Employment practices, like those compelled by the California pregnancy disability law, that classify employees on the basis of sex or other impermissible grounds also reinforce "traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. at 709. Title VII in general and the PDA in particular were intended to break down such traditional marketplace assumptions concerning pregnant women, and the PDA unambiguously forbids "special treatment of pregnancy." *See Arizona Governing Committee* v. *Norris*, 463 U.S. at 1084-85 n.14. The California pregnancy disability law, which compels such special treatment, is thus at fundamental odds with both the PDA and Title VII.

Upholding the California pregnancy disability law on the ground that it eliminates adverse impact would justify other state laws establishing race and sex-based classifications predicated upon similar generalized assumptions that preferential treatment is appropriate to redress assumed disparate impact. For example, a state could enact a law requiring employers to increase test scores or eliminate diploma requirements solely for certain classes of employees, or to provide physical training programs only to women. The result would invariably be a patchwork of laws, however well-intentioned, establishing the very sex and race-based classifications that Title VII and the PDA were designed to banish from the workplace.

C. The California Pregnancy Disability Law Cannot Be Harmonized With Title VII By Extending The Statute To Cover Non-Pregnant Employees.

The irreconcilable conflict between Title VII and the California pregnancy disability law may not be eliminated by construing the state law to require employers within the state to extend the disability leave rights now mandated solely for pregnant employees to all members of the workforce. To be sure, such an extension of the California pregnancy disability law would allow an employer to comply with both the state law and Title VII. But it would be most inappropriate for a federal court to rewrite a state law by mandating, in the name of Title VII, an unprecedented general program of disability leave rights for all disabled employees.

The choice between "extension" and "nullification" is an alternative sometimes available in a context such as this case. *See, e.g., Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984). Nonetheless, the courts should not and will not use their remedial powers to "circumvent the intent of the legislature," *Califano* v. *Wescott*, 443 U.S. 76, 94 (1979) (Opinion of Powell, J.), and should therefore "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Welsh* v. *United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring in the result.). Although this Court has on occasion extended underinclusive federal statutes violating equal protection and due process guarantees,[25] it has—

---

[25] *See, e.g., Califano* v. *Westcott*, 443 U.S. at 89-91 (federal welfare benefits provided to families when the father is unemployed extended to circumstances when mother is unemployed); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (social security survivors benefits extended to widowers regardless of dependency); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) (extending to widowers the right to collect social security benefits previously available only to widows); *Frontiero* v. *Richardson*,

perhaps due in part to respect for principles of federalism—uniformly declined to extend underinclusive state statutes suffering from similar constitutional defects.

For example, in *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980), the state law at issue denied workmen's compensation benefits to a surviving husband on his wife's work-related death unless he was either incapacitated or proved dependency on his wife's earnings, but granted a surviving wife comparable benefits without the need to prove incapacity or dependency. After determining that the gender-based classification violated equal protection principles, the Court turned to the question whether the constitutional defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows. The Court declined to rewrite the state law to do either, stating:

> Because state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation.

Id. at 152-53.

Similarly, in *Caban* v. *Mohammed*, 441 U.S. 380 (1979), a New York statute permitting an unwed mother, but not an unwed father, to block adoption of a child by withholding consent was declared invalid under the equal protection clause. The Court refused to extend the statute to cover unwed "parents," observing that "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State]." *Id.* at 392-93 n.13, *quoting Lalli* v. *Lalli*, 439 U.S. 259 (1978); *see*

411 U.S. 677 (1973) (extension of presumption of dependency to husbands of service women in same manner as to wives of servicemen).

also Orr v. *Orr*, 440 U.S. 268, 283 (1979) (invalidating Alabama's alimony statutes under which husbands but not wives may be required to pay alimony). And in *Stanton* v. *Stanton*, 421 U.S. at 17-18, this Court invalidated on equal protection grounds a Utah statute providing that child support payments continue to age 21 for males but only to age 18 for females, stating that the issue of whether to extend support to females under 21 or to treat males as adults at 18 is "plainly an issue of state law to be resolved by the Utah court on remand."

When remand to the state court is not available (*e.g*, where, as here, the case was initiated in federal court), this Court has not attempted to assume the role of the state judiciary and has not anticipated the response of the state legislature. Thus, in *Craig* v. *Boren*, 429 U.S. 190 (1976), the Court invalidated on equal protection grounds a state law that prohibited the sale of 3.2% beer to males under 21 and females under 18. The Court, however, declined to refashion the state statute to harmonize it with equal protection guarantees, observing that "the Oklahoma Legislature is free to redefine any cutoff age for the purchase and sale of 3.2% beer that it may choose, provided that the redefinition operates in a gender-neutral fashion." *Id.* at 210 n.24.

This deference to the judgment of the state courts or legislatures has also generally been followed in Title VII preemption cases. In *Homemakers, Inc. of Los Angeles* v. *Division of Industrial Welfare*, which involved a California law requiring that special overtime premiums be paid to women employees, the Ninth Circuit rejected the argument that the state statute could be saved from preemption by extension.

> Although such an interpretation might provide the consistency between the challenged statutes and federal law necessary for upholding the for-

> mer, *it would usurp the legislative power vested exclusively in the state.*

509 F.2d at 22 (emphasis added). The court was reluctant to enter the province reserved to the state legislature, especially as the extension of the premium overtime pay provisions to male workers "would impose a sizeable economic burden on employers" within the state. *Id.* at 23; *accord Burns* v. *Rohr Corp.*, 346 F.Supp. at 997 (a federal court should not "amend" a state's labor law to eliminate a conflict with Title VII); *see generally* B. Schlei and P. Grossman, *Employment Discrimination Law* 369 (2d ed. 1983) ("Most courts since *Homemakers* have opted for invalidation not extension," and "[i]n our view the ultimate outcome of the extension versus invalidation issue will and should be invalidation").[26]

Nor is extension of the California pregnancy disability law appropriate under any Title VII policy. On the contrary, to solve the discrepancy between the California pregnancy disability law and Title VII by insisting that California employers extend the pregnancy benefits to all employees as a matter of federal law, is inconsistent with the clearly expressed intent of Congress in enacting the PDA. Congress repeatedly emphasized its intent that employers should be free to provide any level of disability benefits they wished—or none at all—so long as pregnancy was not used as a criterion for allocating such benefits. *See, e.g.*, S. Rep. 331, *supra*, at 4, Leg. Hist. at 41; H.R. Rep. 948, *supra*, at 5, Leg. Hist. at 151; 123 Cong. Rec.

---

[26] The wisdom of federal court non-interference in such state law [illegible] best illustrated by the events surrounding the decision in *Hays* v. *Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972). In order to avoid Title VII preemption, the Eighth Circuit in *Hays* directed the extension to men of Arkansas statutes that provided for premium pay only for women. Subsequently, in another case, the Arkansas Supreme Court invalidated those very statutes on equal protection grounds. *Arkansas* v. *Fairfield Communities Land Co.*, 260 Ark. 277, 538 S.W.2d 698, *cert. denied*, 429 U.S. 1004 (1976).

at 29664, Leg. Hist. at 135 (remarks of Senator Brooke). Reconciling the PDA with the California provisions by requiring employers to bring their disability leave and fringe benefits programs to whatever level states might have selected for pregnant employees would result in exactly what Congress explicity refused to direct—a requirement that employers provide minimum levels of disability benefits.

Finally, the California Supreme Court has generally favored invalidation of statutory provisions containing gender-based classifications, rather than what it has termed the "drastic alternative" of extension. *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal. 3d 395, 407, 138 Cal. Rptr. 293, 563 P.2d 849 (1977). In *Arp*, the California Supreme Court determined that applying a conclusive presumption of dependency to widows, but not widowers, under the state workers' compensation law could not be remedied by performing what was "properly a legislative function," *i.e.*, extending the presumption to encompass widowers. In declining to proceed in that manner, the court in particular noted the absence of a clear expression of legislative intent favoring extension and the potential economic impact of the extension. 19 Cal. 3d at 409.

Here, there is no evidence that the long-term goal of the California legislature was or is to require employers within the state to provide all employees with minimum disability leave and guaranteed reinstatement rights, or that the California pregnancy disability law was the first step in that direction. Like the PDA, the California pregnancy disability law was enacted in reaction to the Supreme Court's decision in *Gilbert*. The legislative concern was strictly limited to pregnancy. As noted in the legislative analysis of the bill:

> This measure would overcome the current court rulings by naming pregnant employees as a protected class and requiring employers to treat then

in a prescribed way concerning maternity leave, benefits, and disability and health insurance.

Legislative Analysis of AB 1960, Author: Berman, Subject: *Employment Discrimination Based on Pregnancy*, Assembly Committee on Labor, Employment and Consumer Affairs, Bill Lockyer, Chairman, California Legislative Intent Service, p. 2.

Extension of the California pregnancy disability law to cover *all* employees would mark a major legislative initiative, which would manifestly impose substantial administrative and financial burdens on employers within California. Petitioners are aware of no state that has enacted such sweeping legislation.[27] While the California legislature may well have the authority to enact legislation mandating universal disability leave coverage, it has not yet done so. This Court should not anticipate possible developments at the state level and usurp the California legislature's prerogatives to make that decision for itself.

In sum, the California legislature responded to *Gilbert* by placing pregnant workers in a "protected class," entitled to special benefits. The federal legislature took another approach—insisting that pregnancy was a physical condition like many others that could be protected by insisting that it be treated solely on the basis of the ability or inability to work. The two approaches are analytically inconsistent and the California method must yield under the Supremacy Clause to the federal standard. It would frustrate the intent of both the California and the federal legislatures to reconcile the inconsistency by requiring all employees to be given rights which Congress did not intend that they have and which the California legislature intended to grant only to pregnant employees.

---

[27] *See, e.g.*, H.R. 2020, entitled "The Parental Disability and Leave Act of 1985," introduced by Representative Pat Schroeder in April 1985. 131 Cong. Rec. H 1942 (daily ed. April 4, 1985). This bill would, *inter alia*, give job protection for *all* employees who are temporarily disabled because of medical reasons. *Id.* at E 1537 (text of H.R. 2020).

CONCLUSION

The United States Congress has clearly and thoroughly rejected discrimination in employment on the basis of an employee's race, color, religion, national origin or sex. This prohibition means that an employer may not single out an employee's sex or race as a quality or condition determining how he or she shall be treated. An employer may not require that men work for longer hours or women for less pay. Fringe benefits may not differ depending upon an employee's sex.

Congress has made it clear that the condition of pregnancy shall be treated exactly like sex under Title VII. An employer may not use pregnancy as a factor in determining pay, hours, working conditions or disability benefits any more than it can use sex as a basis for such distinctions. Pregnant employees shall not be singled out on the basis of that condition. They must be treated just as an employee with a back injury, an inflamed appendix or a hernia. If their abilities or inabilities to work are equal, employees, whatever their sex, must receive the same benefits when they return to the work.

California's policy is presumably very well intended. Congress, however, adopted a national policy regarding discrimination in employment and declared that that policy shall prevail over inconsistent state policies and practices. While the national policy may have the additional important advantage of eliminating the practice of treating women differently, which perpetuates destructive stereotypes in the work place, the principal reason why it must prevail over the policies of individual states is that Congress has exercised its prerogative under the Constitution to impose a national uniform policy. Congress has been given the power to speak authoritatively in this field and it has done so.

Respectfully submitted.

WILLARD Z. CARR, JR.
*THEODORE B. OLSON
PAMELA L. HEMMINGER
PAUL BLANKENSTEIN
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner
* *Counsel of Record.*

April 4, 1986

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

In The

Supreme Court of the United States

October Term, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
*MARIAN M. JOHNSTON
M. ANNE JENNINGS
BEVERLY TUCKER
Deputy Attorneys General
1515 K Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-7860
Counsel for Respondents
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964 OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, prohibits states from enacting legislation which guarantees reasonable unpaid leave and reinstatement to female employees disabled by pregnancy and which thus ensures that pregnancy disability will not cause female employees to lose their jobs.

TABLE OF CONTENTS

Page

Statement of the Case 2

Summary of Argument 5

Argument:

I. Title VII does not preempt state laws except in extremely limited circumstances. 7

II. Equal employment opportunity is the goal of both Title VII and the FEHA. 11

III. California's Pregnancy Disability Leave Statute is consistent with Title VII, as amended by the PDA. 13

A. California's Statute guarantees equal employment opportunity to employees disabled by pregnancy. 14

B. Congress adopted the PDA to ensure that pregnant employees were guaranteed full equality of employment opportunity, and not to preempt state legislation prohibiting discrimination against pregnant employees. 22

1. Title VII, as amended by the PDA, forbids all forms of pregnancy discrimination, including terminating or otherwise adversely affecting an employee because she is pregnant. 22

2. Cal Fed's myopic interpretation of Title VII is inconsistent with Title VII's goal that equal employment opportunity must not be denied on the basis of pregnancy. 28

C. States are permitted to explore alternative methods of achieving equality of employment opportunity for pregnant employees. 39

Conclusion 45

TABLE OF AUTHORITIES

Page

CASES:

Abraham v. Graphic Arts Intern. Union, 660 F.2d 811 (D.C.Cir. 1981) 21, 25, 36

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 9

American National Ins. Co. v. Fair Employment & Housing Com., 32 Cal.3d 603 (1982) 12

Brown v. Superior Court, 37 Cal.3d 477 (1984) 11

Burg v. Municipal Court, 35 Cal.3d 257 (1983), cert. denied and app. dism., 466 U.S. 967 (1984) 16

California Federal Sav. & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985), cert. granted, — U.S. —, 106 S.Ct. 783 (1986) 4, 26

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 8

Connecticut v. Teal, 457 U.S. 440 (1982) 19

Dessenberg v. American Metal Forming Co., 8 Empl. Prac. Dec. (CCH) ¶ 9575 (N.D. Ohio 1973) 24

Dothard v. Rawlinson, 433 U.S. 321 (1977) 12

EEOC v. Trailways, Inc., 530 F.Supp. 54 (D. Colo. 1981) 33

Estate of Cornelious, 35 Cal.3d 461 (1984), app. dism. sub. nom. *Hall v. Taylor*, 466 U.S. 967 (1984) 16

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 8, 10, 21

Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976) 11

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) ..... passim

Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..... passim

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. —, 105 S.Ct. 2371 (1985) 7, 8, 10

TABLE OF AUTHORITIES—Continued

	Page
Hines v. Davidowitz, 312 U.S. 52 (1941)	8
Hishon v. King & Spaulding, 467 U.S. 69 (1984)	12
Homemakers, Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), cert. denied, 423 U.S. 1063 (1976)	20
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	13
Jeffries v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985), cert. denied, — U.S. —, 106 S. Ct. 1273 (1986)	33
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	8, 10, 35
Judson Steel Corp. v. Workers' Comp. Appeals Bd., 22 Cal.3d 658 (1978)	19
Kansas Ass'n of Commerce and Industry v. EEOC, 33 Fair Emp. Prac. Cas. (BNA) 588 (D.Kan. 1983)	36
Lau v. Nichols, 414 U.S. 563 (1974)	34, 35
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978)	20
Miller-Wohl Co., Inc. v. Com'r of Labor & Industry, 515 F.Supp. 1264 (D. Mont. 1981), vacated on juris. grounds, 685 F.2d 1088 (9th Cir. 1982)	26
Miller-Wohl Co., Inc. v. Com'r of Labor & Industry, 692 P.2d 1243 (Mont. 1984), appeal docketed, 53 U.S.L.W. 3718 (April 9, 1985) (No. 84-1545)	26
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977)	passim
Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)	passim
Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Comm'n, 461 U.S. 190 (1983)	10, 36

TABLE OF AUTHORITIES—Continued

	Pages
Price v. Civil Service Com., 26 Cal.3d 257 (1980), cert. dism., 449 U.S. 811	11, 12
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	35
Reiver v. Murdoch & Walsh, P.A., 625 F.Supp. 998 (D. Del. 1985)	26
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	8, 10
Richardson v. Quik Trip Corp., 591 F.Supp. 1151 (S.D. Iowa 1984)	33
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	9, 39
South Carolina v. Katzenbach, 383 U.S. 301 (1966)	19
United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979)	11
Woods v. Safeway Stores, Inc., 420 F.Supp. 35 (E.D. Va. 1976), aff'd, 579 F.2d 43 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979)	33
UNITED STATES CONSTITUTION:	
Supremacy Clause, U.S. Const., Art. VI, cl. 2	8
FEDERAL STATUTES:	
Pregnancy Discrimination Act of 1978, Pub.L.No. 95-555, 92 Stat. 2076	2
Pub.L.No. 88-352, 78 Stat. 255	21
Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d	34
Section 1104 of Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4	9

TABLE OF AUTHORITIES—Continued

Pages

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ..... passim

Section 701(b) of Title VII, 42 U.S.C. § 2000e(b) ... 3, 22

Section 701(k) of Title VII, 42 U.S.C. § 2000e(k) ... 2, 22

Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) 24

Section 705(a) of Title VII, 42 U.S.C. § 2000e-4(a) 11

Section 708 of Title VII, 42 U.S.C. § 2000e-7 ..... 8, 9

Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* 18

FEDERAL REGULATIONS:

7 C.F.R. § 15a.57(d) (1986) 26

10 C.F.R. § 1040.53(d) (1986) 26

29 C.F.R. § 1604.10(c) (1985) 21, 26, 36, 40

29 C.F.R. Part 1604 (Appendix), Question No. 9 36

34 C.F.R. § 106.57(d) (1985) 26

41 C.F.R. § 60-20.3(g) (2) (1985) 26

45 C.F.R. § 86.57(d) (1985) 26

STATE STATUTES:

California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900 *et seq.* ..... passim

Cal. Gov't Code § 12920 ..... 10, 12

Cal. Gov't Code § 12921 12

Cal. Gov't Code § 12926(c) 3

TABLE OF AUTHORITIES—Continued

Pages

Cal. Gov't Code § 12935(a)(1) 15

Cal. Gov't Code § 12935(h) 15

Cal. Gov't Code § 12943, Cal. Stats. 1980, ch. 922, § 4, p.3151 ..... 15, 16

Cal. Gov't Code, § 12945(b)(2), Cal. Stats. 1980, ch. 992, § 4, p.3152 ..... passim

Cal. Gov't Code § 12945(e), Cal. Stats. 1980, ch. 992, § 4, p.3153 3

Cal. Labor Code § 132a 19

Cal. Labor Code § 1420.2, Cal. Stats. 1975, ch. 914, § 3, p.2018 ..... 15, 16

Cal. Labor Code § 1420.35(b)(2), Cal. Stats. 1978, ch. 1321, § 1, p.4320 ..... 2, 16

Cal. Labor Code § 1420.35(e), Cal. Stats. 1979, ch. 13, § 1, p.37 3

Cal. Stats. 1970, ch. 1508, § 4, p.2995 20

Cal. Stats. 1978, ch. 1321, § 4, p.4322 3

Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West Supp. 1985) 36, 40

Mass. Gen. Laws Ann. ch. 149, § 105D (West 1982) 40

Mont. Code Ann. §§ 49-2-310 and 49-2-311 (1985) 36, 40

STATE REGULATIONS:

California Fair Employment and Housing Commission's Proposed Regulation § 7291.2(c) 19, 30

Colo. Sex Discrimination Rules, Rule 80.8(c) 41

Hawaii Sex Discrimination Rules, § 12-23-58 40

Ill. Commission Guidelines § 2.10, 56 Ill. Admin. Code § 5210.110 36

TABLE OF AUTHORITIES—Continued

	Pages
Iowa Commission Rules, Rule 3.10	41
Kan. Commission Rules and Procedure, § 21-32-6(c)	41
Me. Commission Employment Regulations, § 3.06(F)	41
Mo. Code of State Regulations, Title 4, Div. 180, ch. 3 § 16(B)	41
N.H. Sex Discrimination Guidelines, HUM 402.03	40
Ohio Civil Rights Com'n Rules, § 4112-5-05(G)(2)	40
Okla. Commission Guidelines, V(1)(3)	41
R.I. Sex Discrimination Guidelines, 7(b)	41
Wash. Sex Discrimination Regulations, W.A.C. 162-30-020(5)	36, 40

LEGISLATIVE MATERIALS:

Cal. Assembly Bill 1960, 1977-78 Reg. Sess.	16
123 Cong. Rec. 7541 (1977)	30
123 Cong. Rec. 7671 (1977)	42
123 Cong. Rec. 8145 (1977)	30
123 Cong. Rec. 10582 (1977)	30
123 Cong. Rec. 29387 (1977)	30
123 Cong. Rec. 29388 (1977)	18
123 Cong. Rec. 29642 (1977)	24
123 Cong. Rec. 29663 (1977)	42
124 Cong. Rec. 21436 (1978)	30, 40
124 Cong. Rec. 29388 (1978)	30
37 Fed. Reg. 6837 (1972)	24
44 Fed. Reg. 23804 (1979)	26

TABLE OF AUTHORITIES—Continued

	Pages
H. R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978)	passim
Leg. Counsel Dig. of AB 1960, 1977-78 Reg. Sess., Cal. Stats. 1978 Summary Digest 374	16
Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources) (1979)	passim
S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977)	passim

OTHER AUTHORITIES:

Dowd, Maternity Leave: Taking Sex Differences Into Account, 54 Fordham L. Rev. 1101 (1986)	18, 23, 27, 44
8 A Fair Emp. Prac. Man. (BNA)	passim
[1983] EEOC Dec. (CCH) ¶ 6422 (Dec. No. 74-68)	24
[1983] EEOC Dec. (CCH) ¶ 6428 (Dec. No. 74-112)	24
Employment Goals of the World Plan of Action: Developments in the United States, Report for World Conference on the United Nations Decade for Women 1976-1985, U.S. Department of Labor, Office of the Secretary. Women's Bureau	17
S. Kamerman, A. Kahn, and P. Kingston, Maternity Policies and Working Women (1983)	42, 43
S. Kamerman, Maternity and Parental Benefits and Leaves, An International Review, Columbia University, Center for Social Services (1980)	18
Kay, Equality and Difference: The Case of Pregnancy, 1 Berkeley Women's L.J. 1 (1985)	27, 43

TABLE OF AUTHORITIES—Continued

Pages

Kay, Models of Equality, 1985 U.Ill. L. Rev. 39 (1985) 23, 43

Larson & Larson, 1 Employment Discrimination 8-31, § 38.22 (1985) 27

Law, Rethinking Sex and the Constitution, 134 U. Pa. L. Rev 955 (1984) 43, 44

Little, Mother Load or Overload: The Need for a National Maternity Policy, 17 N.Y.U.J. Int'l L. & Pol. 717 (1985) 23

Note, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 Yale L.J. 929 (1985) 23, 28

Note, Equality in the Work Place: Is That Enough for Pregnant Workers?, 23 J. Fam. L. 401 (1984-85) 41

Note, Newport News Shipbuilding & Dry Dock Co. v. EEOC and Sex Discrimination Under Title VII: Some Questions Answered, Others Remain, 88 Dick. L. Rev. 357 (1984) 23

Note, Sexual Equality Under the Pregnancy Discrimination Act, 83 Col. L. Rev. 690 (1983) 23, 28

Note, Toward a Redefinition of Sexual Equality, 95 Harv. L. Rev. 487 (1981) 44

20 Facts on Women Workers, U.S. Department of Labor, Office of the Secretary, Women's Bureau 17

Wildman, The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence, 63 Or. L. Rev. 265 (1984) 44

No. 85-494

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

BRIEF OF RESPONDENTS

—o—

OPINIONS BELOW, JURISDICTION, AND AUTHORITY

Respondents agree with petitioners' statements as to the opinions below, jurisdiction, and authority.

—o—

STATEMENT OF THE CASE

This case concerns an alleged conflict between federal and state legislation forbidding employment discrimination on account of pregnancy.[1] Both the federal and state statutes at issue in this case were amended in 1978 to ensure that pregnancy would no longer deprive female employees of equal employment opportunities. The fact that only women become pregnant is a biological reality that must be taken into consideration.

Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076, which added a new definition to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Title VII prohibits employers from terminating or otherwise discriminating against employees on a number of bases, including sex, and the PDA specifies that sex discrimination includes discrimination on the basis of pregnancy. Section 701(k) of Title VII, 42 U.S.C. § 2000e(k).

In the same year, the California Legislature amended the California Fair Employment and Housing Act (FEHA), Cal. Gov't. Code §§ 12900 *et seq.*, to include, *inter alia*, a pregnancy disability leave statute. Former Cal. Labor Code § 1420.35(b)(2), Cal. Stats. 1978, ch. 1321, § 1, p. 4320; now Cal. Gov't. Code § 12945(b)(2), Cal. Stats. 1980, ch. 992, § 4, p. 3152. As respondents interpret this statute, an employer may not terminate a female employee disabled by pregnancy, and must, at a minimum, provide such employee with an unpaid leave for a reasonable time,

1. The term "pregnancy", as used throughout this brief, includes "pregnancy, childbirth, or related medical conditions."

up to four months, during the period of actual disability caused by pregnancy, and thereafter reinstate such employee to the same or a substantially similar position. If "unduly restrictive, insufficient or no leave is available," California's FEHA "insure[s] that women affected by pregnancy, childbirth or related medical conditions have equal employment opportunities as persons not so affected." (J.A. 49). The California statute thus guarantees that pregnancy disability will not cost female employees their jobs.

California employers of fifteen (15) or more employees must comply with both of these laws.[2]

The 1978 amendments to both the federal and state laws were intended to correct and clarify the uncertainty which then existed as to the protections female employees were guaranteed against employment discrimination on account of pregnancy. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court held that Title VII did not prohibit employers from excluding pregnancy coverage from an otherwise comprehensive disability benefits plan. However, in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), this Court held that Title VII did prohibit em-

2. The requirement of a reasonable unpaid pregnancy disability leave of up to four months, with subsequent reinstatement, is the only provision of the 1978 amendment to California's employment discrimination law which applies to employers subject to Title VII. Cal. Stats. 1978, ch. 1321, § 4, p. 4322; codified as former Cal. Labor Code § 1420.35(e), Cal. Stats. 1979, ch. 13, § 1, p. 37; now Cal. Gov't. Code § 12945(e), Cal. Stats. 1980, ch. 992, § 4, p. 3153. Petitioners' Title VII preemption claim solely concerns employers of fifteen or more employees, who are therefore subject to both Title VII (section 701(b) of Title VII, 42 U.S.C. § 2000e(b)) and California's employment discrimination law (Cal. Gov't. Code § 12926(c)).

ployers from depriving employees returning from pregnancy leave of their accumulated seniority. As the Court explained, Title VII does not "permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.*, at 142 (footnote omitted). Both Title VII and the FEHA were amended in response to the *Gilbert* decision.

The instant controversy began in 1982, when petitioner California Federal Savings and Loan Association (Cal Fed) refused to permit a female employee, Lillian D. Garland, to return to work after her recovery from pregnancy disability (J.A. 41-42). Cal Fed was accused of violating California's pregnancy disability leave statute, Cal. Gov't. Code § 12945(b)(2), and an administrative hearing was scheduled (J.A. 42). Cal Fed, together with the other petitioners, filed an action in federal court, claiming that California's pregnancy disability leave statute was preempted by Title VII, as amended by the PDA. Cross-motions for summary judgment resulted in a district court ruling in favor of Cal Fed (Pet. App. E), which was reversed by the Ninth Circuit (Pet. App. A). The Ninth Circuit concluded that the California statute was neither inconsistent with nor unlawful under Title VII, as amended by the PDA, explaining:

> "By making 'pregnancy' a substitute for 'sex' in Title VII's anti-discrimination mandate, Congress procured for pregnancy that which it had already procured for sex: a guarantee against discrimination of all varieties, including facially neutral policies with a disparate impact." *California Federal Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985), *cert. granted*, — U.S. — [106 S.Ct. 783] (1986).

SUMMARY OF ARGUMENT

Title VII and the FEHA share the common goal of achieving equality of employment opportunity, and in 1978, both laws were amended to ensure that equal employment opportunity would not be denied on account of pregnancy. Cal Fed's claim that Title VII preempts the California statute disserves the goal of equal employment opportunity not only by invalidating California's statute, but also by unduly restricting Title VII's guarantee of true, not hypothetical, equality. The elimination of employment discrimination on the basis of pregnancy means little if an employee can still lose her job because she is pregnant.

Title VII preempts state laws only in rare cases. Indeed, Title VII expressly preserves most state laws, including dissimilar laws which extend to areas beyond those covered by Title VII. Congress explicitly disavowed any intent to preempt state laws merely because such laws differed from Title VII, and limited Title VII's preemptive effect to state laws which purport to require or permit an employer to violate Title VII or which contravene the purposes of Title VII. Neither of these prerequisites for preemption exists in the instant case. Even though the federal and state amendments differ in language and express requirements, this difference does not require preemption since both laws guarantee that pregnancy does not inevitably place female workers at a disadvantage.

California's pregnancy disability leave statute eliminates a burden uniquely faced by working women: loss of job due to pregnancy disability. The statute provides

that pregnant employees will be given a reasonable period of unpaid leave, up to four months, during the actual time that such employees are disabled by pregnancy, and further ensures that such employees will be reinstated to their jobs after the pregnancy disability ends. This guarantee of continued employment protects pregnant employees from being adversely affected due to a gender-specific characteristic. Since men never lose their jobs due to pregnancy disability, the state statute does not grant preferential treatment to women. It simply guarantees equality for all workers.

The PDA amended Title VII to define sex discrimination as including pregnancy discrimination, thus prohibiting all forms of discrimination on the basis of pregnancy, including disparate impact discrimination. While the enactment of the PDA was in direct response to the *Gilbert* decision, and the PDA and its legislative history primarily focus on the need to ensure that women disabled by pregnancy are not denied paid benefits provided to other disabled employees, Congress intended to provide full equality of employment opportunity to pregnant employees. This guarantee of equal opportunity includes preventing women from being denied employment because of pregnancy and protecting pregnant employees from neutral employment practices which adversely affect them because of their pregnancy.

California's pregnancy disability leave statute similarly prevents pregnancy from disadvantaging female workers, and it is consistent with federal law. Congress never intended to prevent states from adopting different approaches to eliminating pregnancy discrimination and,

to the contrary, in enacting the PDA Congress voiced approval of state laws similar to that of California at issue herein. Since the California statute furthers Title VII's goal of equal employment opportunity for pregnant employees, the decision below by the Ninth Circuit should be affirmed and the California statute should be upheld as an appropriate addition to Title VII.

—o—

ARGUMENT

I. TITLE VII DOES NOT PREEMPT STATE LAWS EXCEPT IN EXTREMELY LIMITED CIRCUMSTANCES.

Cal Fed's contention that California's pregnancy disability leave statute, Cal. Gov't. Code § 12945(b)(2), is preempted by Title VII "faces an uphill battle." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. —, [105 S.Ct. 2371, 2375] (1985). Title VII rarely preempts state laws, and the unusual circumstances which warrant supersession of state laws are not present in this case.

The California statute supplements the protections manifested in Title VII, and Title VII expressly preserves, rather than usurps, the authority of states to enact their own supplementary laws. The only limitation is that state laws may not permit or require employers to violate Title VII and may not be inconsistent with the purposes of Title VII. Neither of these prerequisites exists here. Furthermore, where, as here, state employment discrimination laws are enacted pursuant to the

police power of a state, a presumption against preemption is created.

Unquestionably, under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, Congress may supersede state laws in various ways: first, by express preemption language, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); second, by occupation of an entire field, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); and, finally, by the enactment of a federal law which actually conflicts with state law so that "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or the state law "stands as an obstacle to the accomplishment and execution" of federal law, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See generally Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S.Ct., at 2375; and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).

Clearly the first two possible bases of preemption, by express language or total occupation of an area, do not exist for Title VII preemption claims. Indeed, Congress has expressly disclaimed any intent for Title VII to preempt state laws merely because such laws either parallel or exceed federal law requirements. As section 708 of Title VII, 42 U.S.C. § 2000e-7 states:

> "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."[3]

Moreover, section 1104 of Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4, provides:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

The import of these sections is to preserve state laws which either supplement or exceed Title VII's prohibitions on employment discrimination. As this Court explained in its recent review of a New York law which granted protections beyond Title VII:

> " . . . Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, see § 708, 78 Stat 262, 42 USC § 2000e-7 . . . . Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 (1983).

In addition to overcoming these express disclaimers of any intent to preempt state laws merely because such laws differ from Title VII, Cal Fed would also have to overcome a presumption against federal ouster of state

---

3. Section 708 of Title VII is the statutory provision this Court primarily refers to as determining the preemptive effect of Title VII. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101 and 103 (1983); and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 423, n.18 (1975).

police power, for its preemption claim to succeed. California's FEHA was enacted pursuant to the police power of the state. Cal. Gov't. Code § 12920.[4] Preemption of the FEHA would therefore be contrary to "the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S.Ct., at 2376. As this Court explained in *Jones v. Rath Packing Co.*, 430 U.S., at 525, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230:

> "Where . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States, . . . 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (Citations omitted.)

See also Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Comm'n., 461 U.S. 190, 206 (1983).

In sum, where, as here, there is "no irreconcilable conflict," this Court will not "conclude that Congress legislated the ouster of this California statute . . . in the absence of an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers*, 373 U.S., at 146-147. The absence of any such mandate in the instant case compels the conclusion that the state statute is valid.

---

4 Cal. Gov't. Code § 12920 provides, in pertinent part, that the FEHA "shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state."

II. EQUAL EMPLOYMENT OPPORTUNITY IS THE GOAL OF BOTH TITLE VII AND THE FEHA.

Equality of employment opportunity is unquestionably the goal of both Title VII and California's FEHA,[5] and this fundamental purpose of both laws is of paramount importance. Given the narrow range of state laws superseded by Title VII, the question before the Court is whether the objectives and purposes of the two laws are compatible or in conflict. Both laws must, of course, be interpreted so as to accomplish their purposes. *See United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201-202 (1979) (Title VII); and *Brown v. Superior Court*, 37 Cal.3d 477, 485 (1984) (FEHA).

As the California Supreme Court has stated, the ultimate objective of both Title VII and the FEHA is "a society in which equal employment opportunity is a reality rather than an elusive dream." *Price v. Civil Service Com.*, 26 Cal.3d 257, 262 (1980), *cert. dism.*, 449 U.S. 811. Title VII is subtitled "Equal Employment Opportunities," and the federal enforcement agency is named the Equal Employment Opportunity Commission (EEOC). Section 705(a) of Title VII, 42 U.S.C. § 2000e-4(a). Title VII's guarantee of equality in employment opportunity has been described by this Court on numerous occasions. In *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 763 (1976), for example, this Court stated that "Con-

---

5. Employment opportunities are not to be denied on account of race, color, religion, sex, or national origin, and now pregnancy, under Title VII, and race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age (over 40), under the FEHA.

gress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination . . . ." *See also Hishon v. King & Spaulding,* 467 U.S. 69, 75, n.7 (1984); *Nashville Gas Co. v. Satty,* 434 U.S., at 141; *Dothard v. Rawlinson,* 433 U.S. 321, 328 (1977); and the seminal decision addressing equal employment opportunity as the goal of Title VII, *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-431 (1971).

California's FEHA expressly declares that the public policy of the state is "to protect and safeguard the right and opportunity" to hold employment without discrimination, Cal. Gov't. Code § 12920, and further provides that the opportunity to hold employment without discrimination is a civil right, Cal. Gov't. Code § 12921. The state law shares the objectives of Title VII, *Price v. Civil Service Com.,* 26 Cal.3d, at 276, and both laws are intended to promote employment opportunities for those long denied equal participation in the labor market, *id.,* at 273. *See also American National Ins. Co. v. Fair Employment & Housing Com.,* 32 Cal.3d 603, 609, n.5 (1982).

Equality of opportunity is thus the predominant concern in reviewing any particular employment practice to determine compliance with either Title VII or the FEHA,[6] and this concept of "equality" connotes much more than the "equal treatment" model touted by Cal Fed and its amici. While neither Title VII nor the FEHA defines

6. As discussed below in Section III(B), Title VII, as amended by the PDA, extends this guarantee of equal employment opportunity to pregnant employees, and ensures that employees may no longer be denied equal employment opportunity on the basis of pregnancy.

"equality of opportunity," the "equality" which is the goal of both laws is not always achieved merely because employers treat all employees identically. Employment practices which are facially neutral but have a disparate impact and are not justified by business necessity also violate both laws.

As this Court eloquently analogized to the fable of the stork and the fox, "the vessel in which the milk is proffered [must] be one all seekers can use." *Griggs,* 401 U.S., at 431. *See also International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335-336, n.15 (1977). Applying the lesson of this fable to the instant case, the guarantee that equal employment opportunity will not be denied on account of pregnancy requires that women, like men, not be excluded from employment because of pregnancy.

III. CALIFORNIA'S PREGNANCY DISABILITY LEAVE STATUTE IS CONSISTENT WITH TITLE VII, AS AMENDED BY THE PDA.

The sole issue before this Court is whether the California pregnancy disability leave statute either compels employers to disobey Title VII, as amended by the PDA, or is antithetical to the purposes of that federal law.[7] Since both statutes protect employees from discrimination on account of pregnancy, the statutes are completely compatible. Careful analysis of the state and federal statutory language, buttressed by a review of both legis-

7. Since Cal. Gov't. Code § 12945(b)(2) imposes a requirement upon employers, this case does not raise any issue as to the preemptive effect of Title VII upon a state law which purports to permit an employer to violate Title VII.

lative history and prior and subsequent interpretations of Title VII, confirms the validity of the state statute.

A. California's Statute Guarantees Equal Employment Opportunity To Employees Disabled By Pregnancy.

California's pregnancy disability leave statute, Cal. Gov't. Code § 12945(b)(2),[8] ensures that pregnant employees will not lose their jobs on account of pregnancy disability, absent compelling business reasons. The statute was a logical response to a national concern about pregnancy discrimination in employment, and to the confusion which existed after *General Electric Co. v. Gilbert* and *Nashville Gas Co. v. Satty*. Furthermore, the statute promotes the goal of achieving equal employment opportunity which underlies both Title VII and the FEHA. Obviously, no male employee risks losing his job due to childbirth; the California statute merely removes a burden uniquely faced by female employees.

California's statute protects employees disabled by pregnancy from losing their jobs by requiring employers to provide reasonable unpaid pregnancy disability leave, up to four months, to employees disabled by pregnancy, unless excused by a bona fide occupational qualification

8. Cal. Gov't. Code § 12945(b)(2) provides, in pertinent part, that "[i]t shall be an unlawful practice unless based upon a bona fide occupational qualification . . . [f]or any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . . [t]o take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions."

(bfoq) or business necessity. Respondent Fair Employment and Housing Commission of the State of California (Commission), which is the state agency authorized to interpret the FEHA,[9] has also issued proposed regulations on pregnancy discrimination.[10] These regulations further explain that Cal. Gov't. Code § 12945(b)(2) requires employers to guarantee up to a four month unpaid leave for the period of actual disability due to pregnancy, with subsequent reinstatement to the original or a substantially similar job, unless excused pursuant to a bfoq or business necessity.

The legislative history of Cal. Gov't. Code § 12945(b)(2) shows that the California Legislature was seeking to eliminate the discriminatory effect upon female employees of a leave policy which was inadequate to accommodate pregnancy disability. Prior to *Gilbert*, California had enacted a statute providing protection against pregnancy discrimination for school district employees. Former Cal. Labor Code § 1420.2, Cal. Stats. 1975, ch. 914, § 3, p. 2018; now Cal. Gov't. Code § 12943, Cal. Stats. 1980, ch. 992, § 4, p. 3151. The first subsection of this statute makes it unlawful to discriminate against female employees of school districts because of pregnancy, and the second subsection makes it unlawful "to terminate any employee who is temporarily disabled, pursuant to or on the basis of an employment pol-

9. *See* Cal. Gov't. Code §§ 12935(a)(1) and 12935(h).

10. Parties have stipulated that these proposed regulations, found at J.A. 47-52, set forth the Commission's interpretation of Cal. Gov't. Code § 12945(b)(2) (J.A. 44), and that respondent Department of Fair Employment and Housing follows these proposed regulations (J.A. 45).

icy under which insufficient or no leave is available, if the policy has a disparate impact on employees of one sex and is not justified by necessity of the public schools." Cal. Gov't. Code § 12943(b).

California Assembly Bill 1960, 1977-78 Reg. Sess., which created former Cal. Labor Code § 1420.35, the predecessor statute to Cal. Gov't. Code § 12945, was designed to expand the protection "to cover all employers, rather than just governing boards of school districts." Leg. Counsel Dig. of AB 1960, 1977-78 Reg. Sess., Cal. Stats. 1978 Summary Digest 374. Since former Cal. Labor Code § 1420.2 protected pregnant school employees from the discriminatory effect of an inadequate leave policy, the pregnancy disability leave statute merely broadened this protection against disparate impact on the basis of pregnancy to all employees.

California's statute differs from Title VII, as amended by the PDA, because the California Legislature itself took notice of the discriminatory effect of an inadequate leave policy upon pregnant employees, rather than leaving this inevitable determination to the courts. This legislative recognition of the fact that inadequate leave adversely affects employees disabled by pregnancy is certainly justified. *See Estate of Cornelious,* 35 Cal. 3d 461, 465 (1984), *app. dism. sub nom. Hall v. Taylor,* 466 U.S. 967 (1984); and *Burg v. Municipal Court,* 35 Cal.3d 257, 268 (1983), *cert. denied* and *app. dism.,* 466 U.S. 967 (1984).

The fact that an inadequate leave policy will cause a substantial number of female employees who bear a child to lose their jobs is beyond legitimate dispute. It is a biological certainty that only women become pregnant and that

pregnancy causes a certain period of disability.[11] This inescapable period of pregnancy disability necessarily means that if an employer's leave policy is inadequate, female employees who become mothers, but not male employees who become fathers, risk losing their jobs because of childbirth. An employment policy which fails to provide adequate leave and reinstatement to accommodate pregnancy disability embodies precisely the type of business practice "fair in form, but discriminatory in operation" proscribed by *Griggs,* 401 U.S., at 431.

The national statistics as to female employees and the need for pregnancy disability leave are irrefutable and unquestionably support the California Legislature's presumption of adverse impact. Approximately 47 million women were in the work force in 1981,[12] and nearly seventy-five percent of women between twenty and twenty-four are expected to be in the work force during the 1980's.[13] More than eighty percent of working women are in their prime

---

11. "[T]he period of disability for a normal pregnancy is 4-8 weeks, . . ." S.Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977), reprinted in the Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources) (1979), p. 41 (hereinafter, Leg. Hist.) "[I]n 95 percent of the cases, the time lost from work due to pregnancy is 6 weeks or less, . . ." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5 (1978), Leg. Hist., at 151.

12. *20 Facts on Women Workers,* U.S. Department of Labor, Office of the Secretary, Women's Bureau 1 (1981).

13. *Employment Goals of the World Plan of Action: Developments in the United States,* Report for World Conference on the United Nations Decade for Women 1976-1985, U.S. Department of Labor, Office of the Secretary, Women's Bureau 12 (1980).

child-bearing years, ages fifteen through forty-five, and ninety-three percent of the women in this age group are expected to have at least one child during these years.[14] An estimated eighty-five percent of women in the work force will become pregnant at least once during their worklife.[15]

In view of these statistics, the California Legislature's decision to establish, as a legislative fact, that an inadequate leave policy adversely affects pregnant employees is certainly justified.[16] The California pregnancy disability leave statute merely substitutes a legislative finding for the inevitable judicial determination as to the burden an inadequate leave policy imposes upon pregnant employees. As this Court explained in sustaining a provision in the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, which similarly substituted a legislative finding for a judicial finding of prima facie discrimination:

> "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. . . . Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (footnote omitted).

California's pregnancy disability leave statute similarly shifts the burden from pregnant employees to employers who may then disprove the prima facie case of disparate impact discrimination on the basis of pregnancy if valid business reasons can be shown to justify any failure to provide adequate leave. Commission's Proposed Regulation § 7291.2(c)(2)(C) (J.A. 50). *See also Griggs*, 401 U.S., at 431; and *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

Cal Fed and its amici mischaracterize the state statute in two significant respects. First, Cal Fed incorrectly asserts that "[t]he state law announces a policy of preferential treatment for pregnant female employees . . . ."

---

14. S. Kamerman, *Maternity and Parental Benefits and Leaves, An International Review*, Columbia University, Center for Social Services 8 (1980).

15. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 Fordham L. Rev. 1101, 1103 (1986). As explained by Senator Kennedy, one of the co-sponsors of the PDA, speaking in support of the PDA:

> "Approximately 85 percent of working women become pregnant at some point during their working lives." 123 Cong. Rec. 29388 (1977), Leg. Hist., at 70.

16. The statistics proffered by amici ACLU, *et al.*, Brief of ACLU 24-28, as to the temporary disability days for both

(Continued on following page)

(Continued from previous page)

male and female employees, while supporting the need for legislation to require leave for all employees, are immaterial to the instant case. First, these statistics include both work-related and non-work-related disabilities, and California already prohibits employers from terminating employees because of work-related disabilities. Cal. Labor Code § 132a; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.*, 22 Cal.3d 658, 669 (1978). Furthermore since Title VII does not prohibit discrimination on the basis of temporary disabilities other than pregnancy, the fact that inadequate disability leave may cause both male and female employees to lose their jobs because of disabilities other than pregnancy is irrelevant to Cal Fed's Title VII preemption claim. The issue herein is discrimination on the basis of pregnancy, and, in particular, whether inadequate leave policies differentially affect working women who bear children, as compared to working men who become fathers without being susceptible to job loss.

(Pet. Brief 35). *See also id.*, at 11-12, and 35-36.[17] California's pregnancy disability leave statute nowhere requires employers to prefer pregnant employees; it merely eliminates a burden only working women face: loss of job due to pregnancy disability.[18]

Second, Cal Fed implies that compliance with both the FEHA and Title VII is impossible. Cal Fed asserts that an employer complying with the California statute *could* violate Title VII (Pet. Brief 11, and 35-36),[19] but some

---

17. Amici share in this erroneous description of Cal. Gov't. Code § 12945(b)(2) as mandating preferential or special treatment of pregnant employees. *See* Brief of Chamber of Commerce 2-4, and 13-16; Brief of Equal Employment Advisory Council (EEAC) 4, 6, and 20-21; Brief of ACLU, *et al.* 46; Brief of NOW, *et al.* 14-17; and Brief of United States 8.

18. Since the California statute addresses a burden uniquely faced by women and is precisely tailored to reach only the period of actual disability due to pregnancy, it also does not improperly classify employees according to statistical or stereotypical generalizations. Every individual who requires leave in order to preserve the guarantee of equal employment opportunity on the basis of pregnancy is provided such leave. *Compare Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (statistical generalization which was not true as to every individual to whom it applied held invalid); and *Homemakers, Inc. v. Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974) (stereotypical generalization that only women needed the protection of overtime pay held invalid), *cert. denied*, 423 U.S. 1063 (1976).

19. This assertion is actually irrelevant to Cal Fed's preemption claim. An employer's compliance with Title VII concerns neither respondents nor, necessarily, this Court in the instant case. Furthermore, the possibility that an employer might violate Title VII even though complying with a state employment discrimination law exists whenever Title VII and the state law differ. For example, sex discrimination in employment was not unlawful under California's law until 1970, Cal. Stats. 1970, ch.

(Continued on following page)

amici incorrectly claim that compliance with both federal and state law is literally impossible (Brief of Chamber of Commerce 2-3, and Brief of EEAC 6).[20] Although the precise leave policies Title VII requires for employees disabled by pregnancy need not be decided in the instant case,[21] compliance with both Title VII and California's pregnancy disability leave statute is obviously not "a physical impossibility." *Florida Lime & Avocado Growers*, 373 U.S., at 142-143.

In sum, the California pregnancy disability leave statute does no more than prevent employers from "impos[ing] on women a substantial burden that men need not suffer." *Nashville Gas Co. v. Satty*, 434 U.S., at 142. Women, like men, are guaranteed the opportunity to decide whether or not to have children without being vulnerable to loss of employment because of the choice to bear children. The statute furthers California's, and the nation's,

---

(Continued from previous page)

1508, § 4, p. 2995, while Title VII has prohibited such discrimination since its enactment in 1964, Pub. L. No. 88-352, 78 Stat. 255. Therefore, if Cal Fed engaged in sex discrimination in the interim period, it would have violated Title VII but complied with state law.

20. *But see* Brief of ACLU 49 and Brief of NOW 11-13, arguing that an employer may comply with both laws by providing leave to all disabled employees. While respondents do not argue that extension of California's statute is required, an employment policy of disability leave for all employees would clearly comply with both Title VII and the FEHA.

21. As discussed below in Section III(B)(1), however, Title VII has been interpreted, like the FEHA, to outlaw leave policies which provide inadequate leave, because "[o]ncoming motherhood was virtually tantamount to dismissal . . . ." *Abraham v. Graphic Arts Intern. Union*, 660 F.2d 811, 819 (D.C.Cir. 1981). *See also* 29 C.F.R. § 1604.10(c) (1985).

interest in ensuring that equality of employment opportunity is not denied on account of pregnancy.

B. Congress Adopted The PDA To Ensure That Pregnant Employees Were Guaranteed Full Equality Of Employment Opportunity, And Not To Preempt State Legislation Prohibiting Discrimination Against Pregnant Employees.

1. Title VII, as Amended by the PDA, Forbids All Forms of Pregnancy Discrimination, Including Terminating or Otherwise Adversely Affecting An Employee Because She is Pregnant.

The PDA amended Title VII's definition of sex discrimination to include discrimination on account of pregnancy. As discussed above in Section II, Title VII's prohibition of employment discrimination has long been recognized as proscribing employment practices which adversely affect employees on a prohibited basis; since the prohibited bases now include pregnancy, employment practices which adversely affect employees on the basis of pregnancy are now prohibited.

Section 701 of Title VII, 42 U.S.C. § 2000e, sets forth the definitions of significant Title VII terms, and section 701(k) of Title VII, 42 U.S.C. § 2000e(k), the new definitional section added by the PDA, provides, in pertinent part:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; . . ."

The only decision of this Court which has addressed the impact of the PDA on Title VII relies upon legislative

history to confirm that the PDA " 'clarifies the definition of sex discrimination for Title VII purposes.' " *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 680, n.20 (1983), quoting S. Rep. No. 95-331, at 5-6, Leg. Hist., at 42-43. *See also Newport News*, at 678, and at 687 (Rehnquist, J., dissenting); and H.R. Rep. No. 95-948, at 3, Leg. Hist., at 149 ("H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the commonsense view and to ensure that working women are protected against all forms of employment discrimination based on sex.").[22]

As Senator Bayh, a co-sponsor, noted in his testimony in support of the PDA:

> "In handing down its decision in Gilbert, the Court made it clear that if Congress wanted to make sure that discrimination on the basis of pregnancy was to be considered sex discrimination, it would have to make that clear by passing legislation so stating. This is precisely what the legislation before us today does —it adds a new section to section 701 of the Civil Rights Act of 1964 specifying that for the purposes

---

22. Numerous commentators have also noted that the PDA altered the definition of sex discrimination, in response to the limited interpretation of that term in *General Electric Co. v. Gilbert*, 429 U.S., at 136. *See* Kay, *Models of Equality*, 1985 U. Ill. L. Rev. 39, 82 (1985); Little, *Mother Load or Overload: The Need for a National Maternity Policy*, 17 N.Y.U.J. Int'l. L. & Pol. 717, 724 (1985); Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 Fordham L. Rev. 1101, 1153 (1986); Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 934 (1985); Note, *Newport News Shipbuilding & Dry Dock Co. v. EEOC and Sex Discrimination Under Title VII: Some Questions Answered, Others Remain*, 88 Dick. L. Rev. 357, 359 (1984); and Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 Col. L. Rev. 690, 692 (1983).

of that act, discrimination on the basis of sex shall include discrimination on the basis of pregnancy, childbirth, or related medical conditions." 123 Cong. Rec. 29642 (1977), Leg. Hist., at 74-75.

The impact of the PDA upon Title VII is evident once this inclusive definition of pregnancy discrimination as sex discrimination is substituted into the substantive provision of Title VII, section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). With this substitution, section 703(a) provides:

> "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's [pregnancy]; or . . . [to] deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of such individual's [pregnancy]."

This substitution shows that two specific practices as to pregnant employees are clearly unlawful. First, an employer may not deprive an employee of employment because of her pregnancy, and, second, an employer may not have an employment policy which adversely affects an employee because of her pregnancy. Prior to this Court's decision in *Gilbert*, this interpretation of Title VII was held by both lower courts and the EEOC. *See Dessenberg v. American Metal Forming Co.*, 8 Empl. Prac. Dec. (CCH) ¶ 9575 (N.D. Ohio 1973); [1983] EEOC Dec. (CCH) ¶ 6422 (Dec. No. 74-68); [1983] EEOC Dec. (CCH) ¶ 6428 (Dec. No. 74-112); and 37 Fed. Reg. 6837 (1972), § 1604.10(c) of the 1972 EEOC Guidelines on Discrimination because of Sex. The Senate and House committee reports on the PDA concluded that the 1972 EEOC Guidelines and the pre-*Gilbert* court rulings were correct. S. Rep. No. 95-331, at 2, Leg. Hist., at 39; and H.R. Rep. No. 95-948, at 2, Leg. Hist., at 148. As this Court reviewed the PDA's history in *Newport News*, "[p]roponents of the bill repeatedly emphasized . . . that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision." *Newport News*, 462 U.S., at 679.

Subsequent interpretations by lower courts and the EEOC reaffirm that under Title VII, as amended by the PDA, an employer may neither terminate an employee because of her pregnancy nor adopt a facially neutral policy which has an adverse impact on pregnant employees. The *Griggs* analysis of disparate impact discrimination applies to pregnancy discrimination, and equal employment opportunity may not be denied on the basis of pregnancy.

In *Abraham v. Graphic Arts Intern. Union*, 660 F.2d 811 (D.C. Cir. 1981), the court held that a ten-day limit on all disability leave constituted unlawful discrimination on the basis of pregnancy, unless excused by reasons of business necessity, explaining:

> "Oncoming motherhood was virtually tantamount to dismissal, though other indispositions might well and usually would pose no threat to continued employment. In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter.
>
> "An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have." *Abraham*, 660 F.2d at 819 (footnote omitted).

See also Reiver v. Murdoch & Walsh, P.A., 625 F.Supp. 998, 1004, n.3 (D. Del. 1985); *Miller-Wohl Co., Inc. v. Com'r of Labor & Industry*, 515 F. Supp. 1264, 1267 (D. Mont. 1981), vacated on juris. grounds, 685 F.2d 1088 (9th Cir. 1982); *Miller-Wohl Co., Inc. v. Com'r of Labor & Industry*, 692 P.2d 1243, 1251 (Mont. 1984), appeal docketed, 53 U.S.L.W. 3718 (April 9, 1985) (No. 84-1545); and, of course, the decision below, *California Federal Savings & Loan Ass'n v. Guerra*, 758 F.2d, at 396. The EEOC has also ratified its 1972 position that an employer may not terminate an employee disabled by pregnancy by means of an inadequate leave policy, where that policy has a disparate impact, stating that "[t]he Pregnancy Discrimination Act reaffirms EEOC's Guidelines with but minor modifications." 44 Fed. Reg. 23804 (1979). *See* 29 C.F.R. § 1604.10(c) (1985).[23]

Other federal agencies responsible for prohibiting sex discrimination in employment similarly conclude that inadequate leave policies may constitute disparate impact discrimination. *See* 7 C.F.R. § 15a.57(d) (1986); 10 C.F.R. § 1040.53(d) (1986); 34 C.F.R. § 106.57(d) (1985); 41 C.F.R. § 60-20.3(g)(2) (1985); and 45 C.F.R. § 86.57(d) (1985).

This interpretation of Title VII, as amended by the PDA, as prohibiting neutral leave policies which disad-

---

23. 29 C.F.R. § 1604.10(c) (1985) states:

"Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

vantage pregnant employees, is also substantiated by numerous legal scholars. As discussed in Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L.J. 1, 27-28 (1985):

> "Men do not experience a conflict between their right to engage in reproductive conduct and their right to be free of discrimination based on sex at work. Women, however, have experienced such a conflict, and will continue to do so unless pregnant workers are safeguarded from the loss of employment opportunities during pregnancy."

As further explained in Dowd, *Maternity Leave*, 54 Fordham L. Rev., at 1105-1107 (footnotes omitted):

> "In order to ensure that pregnancy disability is not an excuse for actual or constructive discharge, or for any diminution in the terms and conditions of employment, maternity leave during the period of pregnancy-related disability is essential."

In Larson & Larson, 1 *Employment Discrimination* 8-31, § 38.22 (1985), in describing a leave policy inadequate to accommodate pregnancy disability, the authors observed:

> "We have here an example of the kind of case in which an 'equality' issue cannot be disposed of by decreeing that the sexes shall be treated exactly alike. Instead, we must build upon a quite different premise: when the two sexes are *dissimilar* in that one sex exclusively possesses a trait which the other, without exception, does not possess, and when that trait has a bearing upon employability, it is a differentiation based on sex to treat the two sexes *similarly* as to that trait. Clearly, if an employer says, 'All pregnant employees will be fired,' there is sex differentiation. It is really no different in effect to say, 'No maternity leaves will be granted.' . . . [S]ome leave accompany-

> ing childbirth is an accepted modern necessity, and a policy of denying it, with discharge as the alternative, is tantamount to a policy of outright discharge for pregnancy. In other words, discharge for pregnancy is sex differentiation unless accompanied by the alternative of maternity leave."

See also Note, *Employment Equality*, 94 Yale L.J., at 942-943; and Note, *Sexual Equality*, 83 Col. L. Rev., at 721-722, and at 726 ("[A]n employer who adopts a sex-blind no-leave-of-absence policy discriminates against women by failing to recognize and compensate for the different reproductive roles of the sexes.").

This interpretation of Title VII, as amended by the PDA, as providing equal employment opportunity, including prohibiting disparate impact discrimination on the basis of pregnancy, is required if Title VII is to prohibit pregnancy discrimination on the same basis as sex, and as race, color, religion, and national origin.

2. Cal Fed's Myopic Interpretation of Title VII Is Inconsistent With Title VII's Goal That Equal Employment Opportunity Must Not Be Denied On The Basis of Pregnancy.

Cal Fed proposes an alternative narrow interpretation of Title VII, as amended by the PDA, which would deny full protection against all forms of discrimination on the basis of pregnancy. Cal Fed argues that instead of pregnancy discrimination being prohibited equally with all the other unlawful bases of discrimination, the PDA provides only partial protection against pregnancy discrimination, and does not reach neutral policies with a disparate impact. In particular, Cal Fed claims that an employer may

terminate or deny leave and reinstatement to pregnant employees, so long as employees with other disabilities not protected by Title VII are treated equally harshly. Furthermore, to support its preemption claim, Cal Fed argues that Title VII mandates that states be equally unconcerned with employment policies which have a discriminatory effect on pregnant employees.

Cal Fed's unduly restrictive interpretation must be rejected both because it fails to guarantee equal employment opportunity to pregnant employees and because it unreasonably interferes with the authority of individual states to supplement Title VII's goal of equal employment opportunity. Cal Fed's claim that the California pregnancy disability leave statute is inconsistent with Title VII collapses once the purpose of the PDA is properly understood "to ensure that working women are protected against *all forms* of employment discrimination based on sex." H.R. Rep. No. 95-948, at 3, Leg. Hist., at 149; and S. Rep. No. 95-331, at 3, Leg. Hist., at 40 (emphasis added).

The basis for Cal Fed's claim that Title VII, as amended by the PDA, provides employees less protection from pregnancy discrimination than from other kinds of discrimination, and, moreover, that Title VII forbids states from fully protecting the equal employment opportunity of pregnant employees, is the second clause of the PDA. After defining sex discrimination to include discrimination on the basis of pregnancy, the PDA states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."

Respondents submit that Cal Fed both misconstrues the import of the second clause of the PDA, and underestimates the significance of defining sex discrimination to include discrimination on the basis of pregnancy. The second clause specifically addresses the *Gilbert* situation in which an employer provides benefits for other disabilities but excludes coverage of pregnancy disability.[24] All parties agree that such employment practices are now unlawful, but the issue in this case is whether such exclusionary practices are the only practices prohibited by Title VII, as amended by the PDA.

The second clause of the PDA should not be construed, as Cal Fed contends, as a repudiation of the disparate impact analysis set forth in *Griggs* and *Satty*. To

---

24. The legislative history of the PDA is replete with references to the requirement that an employer may not exclude pregnancy from any disability benefits paid by the employer. *See* S. Rep. No. 95-331, at 5-6, Leg. Hist., at 42-43; H.R. Rep. No. 95-948, at 5, Leg. Hist., at 151; 123 Cong. Rec. 7541 (1977), Leg. Hist., at 7 (Remarks of Sen. Brooke); 123 Cong. Rec. 29387 (1977), Leg. Hist., at 66 (Remarks of Sen. Javits); and 124 Cong. Rec. 21436 (1978), Leg. Hist., at 168 (Remarks of Rep. Sarasin).

Because of a widespread concern about the cost of including pregnancy in disability benefit plans, Congress assured employers that the PDA did not require employers to pay any disability benefits, but only to extend existing benefits to pregnancy. *See* S. Rep. No. 95-331, at 4, Leg. Hist., at 41; H.R. Rep. No. 95-948, at 4, Leg. Hist., at 150; 123 Cong. Rec. 7541 (1977), Leg. Hist., at 8 (Remarks of Sen. Brooke); 123 Cong. Rec. 8145 (1977), Leg. Hist., at 19 (Remarks of Sen. Bayh); 123 Cong. Rec. 10582 (1977), Leg. Hist., at 25 (Remarks of Rep. Hawkins); and 124 Cong. Rec. 29388 (1978), Leg. Hist., at 71 (Remarks of Sen. Kennedy). California's pregnancy disability leave statute is consistent with this disclaimer of any intent to require employers to adopt new disability benefit plans, since it also requires only that any disability benefits which are offered be extended to pregnancy disability. Proposed Regulation § 7291.2(c) (J.A. 49).

the contrary, employment practices which have a discriminatory effect on the basis of pregnancy are also covered by Title VII *because* such practices are now, by definition, discrimination on the basis of sex.

The legislative history of the PDA confirms that while Congress was primarily concerned with overturning *Gilbert*, Congress did not intend to limit the prohibition on pregnancy discrimination so as to exclude disparate impact coverage. To the contrary, full protection of equal employment opportunities was envisioned. As stated in S. Rep. No. 95-331, at 6, Leg. Hist., at 43:

> "In addition to its impact upon fringe benefit programs, this legislation proscribes various other employment policies which adversely affect pregnant women."

See also H. R. Rep. No. 95-948, at 6, Leg. Hist., at 152.

Furthermore, as stated in H.R. Rep. No. 95-948, at 3, Leg. Hist., at 149, "the bill would eliminate the need *in most instances* to rely on the impact approach" (emphasis added), clearly implying that disparate impact analysis would remain applicable in appropriate cases. In referring to employment policies other than fringe benefits, the legislative history confirms Title VII's commitment to equal employment opportunity. H. R. Rep. No. 95-948, at 7, Leg. Hist., at 153, states that "the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964."

Even though pregnancy disability leave furthers Title VII's goal that equal employment opportunity should not

be denied on the basis of pregnancy, Cal Fed contends that Title VII forbids employers to provide such leave, and also preempts states from requiring such leave, unless the employer also provides leave for all other temporary disabilities. Ignoring the biological fact that no man ever needs or could possibly use pregnancy disability leave, Cal Fed claims that providing such leave somehow constitutes discrimination which violates Title VII.[25]

Cal Fed interprets the second clause of the PDA as validating neutral, but inadequate, leave policies despite their adverse impact on the basis of pregnancy. However, the "same treatment" language of the second clause has an alternative interpretation which, unlike Cal Fed's interpretation, is consistent with and furthers the goal of full equality of employment opportunity. Also, as discussed above in Section III(B)(1), Congress intended the PDA to overturn *Gilbert*, and the second clause of the PDA directly reverses *Gilbert* and expressly requires employers to extend existing disability benefits to employees disabled by pregnancy. This intent to overturn *Gilbert* does not indicate any intent to eliminate the disparate impact approach of *Satty*.

The "same treatment" language does mean that where an employment policy has an adverse effect on per-

---

25. Cal Fed argues that such leave discriminates against male employees disabled for other reasons, overlooking the fact that male and female employees are similarly affected by disabilities other than pregnancy, and are similarly disadvantaged by any inadequate leave policies for such disabilities.

A policy or a statute providing leave for pregnancy disability, but not for other temporary disabilities, might be viewed as discrimination against persons with other disabilities, but Title VII does not forbid such discrimination.

sons with a particular disability, *and* that disability is invariably associated with a prohibited basis of discrimination, a prima facie violation of Title VII exists. Although Title VII does not prohibit disability discrimination, it does cover neutral employment practices which have a discriminatory effect on a particular disability which is inevitably linked to a prohibited basis of discrimination. For example, a no-beard policy may discriminate on the basis of race because such a policy disproportionately affects black males, who are often afflicted with pseudofolliculitis barbae. *See Richardson v. Quik Trip Corp.*, 591 F.Supp. 1151, 1155 (S.D. Iowa 1984); *EEOC v. Trailways, Inc.*, 530 F.Supp. 54, 57 (D. Colo. 1981); and *Woods v. Safeway Stores, Inc.*, 420 F.Supp. 35, 42, (E.D. Va. 1976), *aff'd*, 579 F.2d 43 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). A refusal to hire persons with sickle cell anemia may also violate Title VII because of its disparate impact on blacks. *See Jeffries v. Chicago Transit Authority*, 770 F.2d 676, 678 (7th Cir. 1985), *cert. denied*, — U.S. — [106 S.Ct. 1273] (1986). The remedy for such discrimination is for the employer to alter the policy so as to accommodate the needs of the adversely affected group. *See Richardson*, 591 F.Supp., at 1155; and *EEOC v. Trailways, Inc.*, 530 F.Supp., at 59.

The legislative history of the PDA not only supports an interpretation of the second clause which guarantees full equality of opportunity, not merely equal treatment; it also contradicts Cal Fed's narrow construction. The legislative history shows that Congress agreed with the *Gilbert* dissent. *See Newport News*, 462 U.S., at 678; H. R. Rep. No. 95-948, at 2, Leg. Hist., at 148; and S. Rep.

No. 95-331, at 2-3, Leg. Hist., at 39-40. One of the bases for dissent in *Gilbert* was that under the majority opinion, "any disability that occurs disproportionately in a particular group—sickle-cell anemia, for example—could be freely excluded from the plan without troubling the Court's analytical approach." *Gilbert,* 429 U.S., at 152, n.5 (Brennan, J., dissenting). The dissenters clearly believed Title VII covered disparate impact discrimination against pregnant employees. *See id.,* at 155, and *id.,* at 161 (Stevens, J., dissenting).

Furthermore, the *Gilbert* dissent specifically recognized that the additional disadvantage of pregnancy, faced solely by women, must be taken into account in order to guarantee equal participation in the workforce. Relying upon *Lau v. Nichols,* 414 U.S. 563 (1974), the dissenters stated:

> "A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies." *Gilbert,* 429 U.S., at 159 (Brennan, J., dissenting).

Lau v. Nichols is of particular import in rejecting Cal Fed's claim that pregnancy disability leave constitutes unlawful preferential treatment of female employees. In *Lau,* the Court interpreted another federal statute, section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which bans discrimination in programs receiving federal aid, and upheld an interpretation of this statute which required schools to take affirmative steps to provide English language instruction to non-English-speaking children in order to guarantee these children an equal

opportunity for an education. *Lau,* 414 U.S., at 568. *See also Regents of the University of California v. Bakke,* 438 U.S. 265, 303 (1978) (Powell, J.), and 351 (Brennan, J., concurring and dissenting).

Remedial instruction does not constitute preferential treatment because "the 'preference' approved did not result in the denial of the relevant benefit—'meaningful opportunity to participate in the educational program' —to anyone else." *Bakke,* 438 U.S., at 304 (Powell, J.). Similarly, in the instant case, pregnancy disability leave does not deny anyone equal employment opportunity without discrimination on the basis of race, color, religion, sex, or national origin.

Cal Fed's restrictive interpretation of the PDA is also contradicted by another portion of legislative history. Congress expressly acknowledged, in its review of the PDA, that some states already guaranteed female employees full protection against pregnancy discrimination, yet Congress failed to include the requisite "clear and manifest purpose" to supersede such state laws. *Pacific Gas & Electric Co.,* 461 U.S., at 206, and *Jones v. Rath Packing Co.,* 430 U.S., at 525. To the contrary, the bill reports noted, with apparent approval, the laws and regulations of several states, including several similar to the state statute at issue herein. H.R. Rep. No. 95-948, at 11, Leg. Hist., at 157. The laws of Connecticut and Montana, and interpretations of the laws of Illinois and Washington were acknowledged, and these states, like California, require employers to grant reasonable pregnancy

disability leave.[26] *See also* S. Rep. No. 95-331, at 10-11, Leg. Hist., at 47-49.

Cal Fed's narrow interpretation of the PDA is only minimally supported by subsequent case law or agency interpretation, and even this minimal support is not without contradiction. The EEOC has, like all parties herein, interpreted the PDA as requiring employers to provide the same benefits for pregnancy as for other disabilities, but, as discussed above in Section III(B)(1), it also continues to interpret Title VII as invalidating inadequate leave policies with a disparate impact on female employees. 29 C.F.R. § 1604.10(c)(1985). *But see* 29 C.F.R. Part 1604 (Appendix), Question No. 9.[27] Case law is likewise of very limited assistance to Cal Fed. In *Kansas Ass'n of Commerce and Industry v. EEOC*, 33 Fair Empl. Prac. Cas. (BNA) 588 (D. Kan. 1983), the court agreed, in passing, that Title VII did not require employers to extend any benefits to women. *Contra Abraham v. Graphic Arts Intern. Union*, 660 F.2d at 819.

---

26. *See* Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West Supp. 1985); Mont. Code Ann. §§ 49-2-310 and 49-2-311 (1985); Ill. Commission Guidelines § 2.10, 56 Ill. Admin. Code § 5210.110, reprinted in 8 A Fair Emp. Prac. Man. (BNA) 453: 2753 and 2764; and Wash. Sex Discrimination Regulations, W.A.C. 162-30-020 (5), reprinted in 8 A Fair Emp. Prac. Man. (BNA) 457:2951. The failure to mention California's statute is of no significance as H. R. Rep. No. 95-948 predates the enactment of the California statute.

27. While Question No. 9 arguably supports Cal Fed's position, it also supports the alternative interpretation that employers must have leave policies which accommodate all disabilities which are inevitably linked to a prohibited basis of discrimination.

Cal Fed relies heavily upon *Newport News* to support its contention that pregnancy disability leave constitutes sex discrimination against male employees, but this reliance is greatly misplaced. *Newport News* involved traditional sex discrimination in compensation, since male employees received a benefit package that was less inclusive than the benefits paid to female employees.

The employer in *Newport News* provided an insurance plan in which female employees and their spouses received hospitalization benefits, including pregnancy coverage, while male employees and their spouses were denied the same benefits. The plan was held to be unlawful sex discrimination in compensation as to the male employees, who were denied the same benefits paid to female employees. *Newport News*, 462 U.S., at 685. As the Court further explained:

> "Although the 1978 Act makes clear that [section 703(a)(1) of Title VII] should be construed to prohibit discrimination against a female employee on the basis of her own pregnancy, it did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee — male or female — which was already present in the Act." *Id.*, at 675-676, n.11.

Sex discrimination obviously exists if male employees are denied a benefit of employment on account of their gender. For example, in addition to the *Newport News* situation in which the insurance benefits for male employees did not cover hospitalization costs for pregnancy, unlawful sex discrimination would exist if female employees, but not male employees, were allowed to use sick leave for child care, or if an insurance plan compensated

female employees, but not male employees, for fertility counseling. In each case, the policy is unlawful because it denies men a benefit solely on the basis of sex. These sex discrimination examples are simply not applicable to policies or state statutes which protect female employees from losing their jobs due to pregnancy disability. Since male employees do not risk job loss because of pregnancy, and could not possibly make use of pregnancy disability leave, a policy or a statute guaranteeing pregnancy disability leave to female employees is identical to a policy or statute guaranteeing such leave to all employees. Furthermore, since the issue in this case is job retention for employees despite pregnancy disability, this case does not raise any question as to discriminating between the spouses of male and female employees. The right to keep a job, and the corresponding risk of losing a job, adhere solely to employees themselves.

Furthermore, *Newport News* supports interpreting the PDA so as to achieve the broad goal that equality of employment opportunity is not to be denied on account of pregnancy. Referring to the first clause of the PDA, which defines sex discrimination to include pregnancy discrimination, the Court said:

> "The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees." *Newport News*, 462 U.S., at 678, n.14.

Since the first clause of the PDA is definitional, and the second clause merely explanatory, particularly as to the PDA's effect on *Gilbert*, Cal Fed's attempt to interpret the PDA so as to safeguard neutral policies which adversely affect pregnant workers, and, moreover, to deprive

states of the authority to protect the employment opportunities of pregnant employees, must be rejected. Policies or state laws which guarantee disability leave to pregnant employees simply ensure that pregnancy will not cause women to suffer a disadvantage men never face—unemployment on account of pregnancy. Such policies and statutes are completely consistent with Title VII's goal that equal employment opportunity should not be denied on account of pregnancy.

C. States Are Permitted to Explore Alternative Methods of Achieving Equality of Employment Opportunity for Pregnant Employees.

While California's pregnancy disability leave statute may require employers to take a step beyond the minimum Title VII requires, such extension beyond federal law does not necessitate preemption. *Shaw v. Delta Air Lines*, 463 U.S., at 103. Even before Title VII was amended by the PDA, many states were protecting female employees from pregnancy discrimination in a variety of ways. According to the House Report on the PDA, 22 states provided some guarantee for pregnant workers, although the form of protection varied greatly. H.R. Rep. No. 95-948, at 10-11, Leg. Hist., at 156-157. The Senate Report indicated 25 states. S. Rep. No. 95-331, at 3 and 10, Leg. Hist., at 40 and 47. As noted above, the House Report specifically identified four states with requirements similar to that at issue herein. And the Senate Report indicated that of the 25 states prohibiting sex discrimination on the basis of pregnancy, "[s]ome of these States, which now provide greater protection for women workers than Title VII does under the *Gilbert* case, have laws which specifically refer to pregnancy." S. Rep. No. 95-331, at 3, Leg. Hist., at 40.

As explained by Representative Sarasin of Connecticut, one of the states with a law similar to California's pregnancy disability leave statute:

> "The States have authority under the Constitution to go beyond requirements of Federal law in these matters, so long as their laws do not conflict with the Federal law. 124 Cong. Rec. 21436 (1978), Leg. Hist., at 168.

At the present time, three other states—Connecticut, Montana, and Massachusetts—have statutes similar to that of California at issue in the instant case, requiring reasonable leaves for pregnancy disability.[28] Five additional states—Hawaii, Illinois, New Hampshire, Ohio, and Washington—have regulations interpreting their employment discrimination laws similarly to the California statute.[29] Furthermore, seven other states—Colorado, Iowa, Kansas, Maine, Missouri, Oklahoma, and Rhode Island—interpret their state laws as prohibiting inadequate leave policies which have a disparate impact on the basis of sex. These regulations are similar to 29 C.F.R. § 1604.10(c) (1985), EEOC's guideline which interprets Title VII as covering

---

28. *See* Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West Supp. 1985); Mont. Code Ann. §§ 49-2-310 and 49-2-311 (1985); and Mass. Gen. Laws Ann. ch. 149, § 105D (West 1982).

29. *See* Hawaii Sex Discrimination Rules, § 12-23-58, reprinted in 8 A Fair Emp. Prac. Man. (BNA) 453:2328-2329; N.H. Sex Discrimination Guidelines, HUM 402.03, reprinted in 8 A Fair Emp. Prac. Man. (BNA) 455:2464; Ohio Civil Rights Com'n Rules, § 4112-5-05(G)(2) reprinted in 8 A Fair Emp. Prac. Man. (BNA) 457:268; and Wash. Sex Discrimination Regulations, WAC 162-30-020(5), reprinted in 8 A Fair Emp. Prac. Man. (BNA) 457:2951.

leave policies with a disparate impact, and which contradicts Cal Fed's narrow interpretation.[30]

In light of the legislative history, the narrow preemptive effect of Title VII, and the shared goals of promoting equal employment opportunity for pregnant workers, there is no legal or logical reason to interpret Title VII as preempting states from exceeding federal requirements as to employment practices which unlawfully discriminate on the basis of pregnancy.

> "In our federal system, states are often thought of as laboratories in which new policies and theories can be tested. The policy enunciated by the Pregnancy Discrimination Act—that pregnancy be treated like any other disability—had been in operation in at least 22 states prior to the PDA's passage in 1978. Many states then were ahead of the federal government in adopting an important social policy. The same can be said today of the maternity leave policies of California, Connecticut, Massachusetts, and Montana." Note, *Equality In The Work Place: Is That Enough For Pregnant Workers?*, 23 J. Fam. L. 401, 416 (1984-85) (footnote omitted).

The need to permit state experimentation as to appropriate employment policies to require for working women who bear children is particularly crucial because of the substantial percentage of such women, and the relative lack of

---

30. *See* Colo. Sex Discrimination Rules, Rule 80.8(c), reprinted in 8 A Fair Emp. Prac. Man. (BNA) 453:1128; Iowa Commission Rules, Rule 3.10, reprinted in 8 A Fair Emp. Prac. Man. (BNA) 453:3098; Kan. Commission Rules and Procedure, § 21-32-6(c), reprinted in 8 A Fair Emp. Prac. Man. (BNA) 453:3311; Me. Commission Employment Regulations, § 3.06(F), reprinted in 8 A Fair Emp. Prac. Man. (BNA) 455:530; Mo. Code of State Regulations, Title 4, Div. 180, ch. 3 § 16(B), reprinted in 8 A Fair Emp. Prac. Man. (BNA) 455:1712; Okla. Commission Guidelines, V (I)(3), reprinted in 8 A Fair Emp. Prac. Man. (BNA) 457:555; and R. I. Sex Discrimination Guidelines, 7(b), reprinted in 8 A Fair Emp. Prac. Man. (BNA) 457:1276-1277.

attention the United States has given to the problems these women face in entering the workforce. As discussed in S. Kamerman, A. Kahn, and P. Kingston, *Maternity Policies and Working Women* 4 (1983):

> "Unlike seventy-five other countries, including all other advanced industrialized societies and many among the less developed countries, the United States has no statutory provision that guarantees a woman the right to a leave from employment for a specific period, protects her job while she is on leave, and provides a cash benefit . . . ."

The dissent in *Gilbert* shared the concern that the United States follow the lead of other countries in protecting pregnant employees, stating:

> "In dictating pregnancy coverage under Title VII, the EEOC's guideline merely settled upon a solution now accepted by every other Western industrial country." *Gilbert,* 429 U.S., at 158 (Brennan, J., dissenting).

Testimony in support of the PDA voiced a similar concern. As Senator Culver stated:

> "S. 995 will bring our law up to the same standards accepted by other western industrial nations." 123 Cong. Rec. 29663 (1977), Leg. Hist., at 133.

See also 123 Cong. Rec. 7671 (1977), Leg. Hist., at 13 (remarks of Sen. Williams).

While California's pregnancy disability leave statute does not provide the cash benefits provided in many other industrial nations, and, like the PDA, only mandates that existing disability benefits be extended to female employees disabled by pregnancy, the state statute does guarantee job retention. California has thus joined other industrial nations, as well as many individual employers,[31] in eliminating an employment disadvantage faced only by women.

The need to permit experimentation as to various solutions to eliminating discrimination on the basis of pregnancy is further documented by the current discussion among legal scholars as to the meaning of "equality" where pregnancy is concerned. One proposed solution suggests that an "episodic analysis will help us to avoid penalizing women as a result of their reproductive behavior and thus permit us to accommodate pregnancy within a legal and philosophical framework that affirms the equality of women and men." Kay, *Equality and Difference: The Case of Pregnancy,* 1 Berkeley Women's L.J. 1, 2 (1985). Since pregnant women are "placed at a temporary disadvantage with respect to equality of opportunity," *id.,* at 26, this disadvantage must be eliminated during the episode of pregnancy in order to achieve equality. *See also* Kay, *Models of Equality,* 1985 U. Ill. L. Rev. 39, 87 (1985).

Another suggested approach similarly requires an equality analysis which recognizes "the reality . . . that only women experience pregnancy." Law, *Rethinking Sex and the Constitution,* 132 U. Pa. L. Rev. 955, 1007 (1984). This approach, like Kay's, focuses on equality of opportunity, because "a concept of equality that denies biological difference has particularly adverse effects upon women." *Id.,* at 955.

---

31. Many individual employers do provide pregnancy disability leave. *See* S. Kamerman, *et al., Maternity Policies and Working Women,* 104-111. Any decision that state laws requiring such leave violate Title VII would also jeopardize these leave programs.

A suggestion has also been made to adopt a "sex differences approach . . . as an essential means to achieve the goal of equal opportunity." Dowd, *Maternity Leave: Taking Sex Differences Into Account,* 54 Fordham L. Rev. 1101, 1166 (1986). Under this approach, "[t]he test of sex discrimination . . . requires an examination of whether the policy, statute or conduct at issue advances or impedes the goal of equal employment opportunity . . . ." *Id.,* at 1166. *See also* Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence,* 63 Or. L. Rev. 265, 305 (1984) ("Achievement of equal justice between women and men ultimately requires understanding our differences."); and Note, *Toward a Redefinition of Sexual Equality,* 95 Harv. L. Rev. 487 (1981).

These articles each support an understanding of "equality" which includes accommodating real differences, and which recognizes that "[t]he requirement that similarly situated individuals be treated the same does not exhaust the idea of equality." Law, *Rethinking Sex,* at 1009. Women, but not men, became pregnant, and female employees are at a disadvantage as compared to men because of that biological difference. Equality requires the elimination of that disadvantage, so that men and women may participate equally in the workforce.

California's pregnancy disability leave statute furthers the goal of equality, once this term is understood to encompass equal opportunity. Title VII should not be construed so as to forbid California from achieving this goal.

———o———

CONCLUSION

California's pregnancy disability leave statute protects female workers from losing their jobs due to pregnancy disability, a burden which uniquely affects working women. While this express guarantee of job retention may exceed Title VII requirements, Title VII does not require state fair employment laws to duplicate federal law. To the contrary, Title VII preserves dissimilar state laws, so long as these laws are not antithetical to Title VII's goal of equality of employment opportunity.

An understanding of the full meaning of equality is essential both to preserve California's pregnancy disability leave statute, and, perhaps more importantly, to retain the same prohibition under Title VII for pregnancy discrimination as exists for the other prohibited bases of discrimination. As this Court ruled 15 years ago, Title VII does "not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox." *Griggs,* 401 U.S. at 431. Freedom from employment discrimination on the basis of pregnancy means little if a female employee loses her job because of pregnancy.

For the foregoing reasons, respondents respectfully request that the decision below by the Ninth Circuit be affirmed.

DATED: June 12, 1986

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General

*MARIAN M. JOHNSTON
M. ANNE JENNINGS
BEVERLY TUCKER
Deputy Attorneys General
1515 K Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-7860

Counsel for Respondents
*Counsel of Record

REPLY

BRIEF

No. 85-494

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; and the CALIFORNIA CHAMBER OF COMMERCE, a non-profit California Corporation,

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; and the FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

On Writ Of Certiorari To the United States Court Of Appeals For the Ninth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

Attorneys for Petitioners
California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce

**Counsel of Record*

WILLARD Z. CARR, JR.
**THEODORE B. OLSON
PAMELA L. HEMMINGER
PAUL BLANKENSTEIN
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

Page

I. TITLE VII AND THE CALIFORNIA PREGNANCY DISABILITY LAW ARE NOT RECONCILABLE. 1

A. Pregnancy May Not Be Treated As A *Sui Generis* Condition Under Title VII. 2

B. Disparate Treatment Is Not An Appropriate Remedy For Disparate Impact. ... 4

C. Discrimination Against Non-Pregnant Employees Is Sex Discrimination Prohibited By Title VII. 7

D. Congress Did Not Endorse State Laws That Provide Special Preferences For Pregnant Employees. 9

II. THE CALIFORNIA PREGNANCY DISABILITY LAW IS PREEMPTED BY TITLE VII. 11

A. Title VII Preempts State Laws That Permit Employment Practices Prohibited By Title VII. 11

B. The Same Preemption Standard Applies To State Laws Dealing With Pregnancy Discrimination. 12

C. Compliance With Both Federal And State Laws Is A Significant Concern Under Title VII's Enforcement Scheme. 13

III. EXTENDING CALIFORNIA'S PREGNANCY BENEFITS TO OTHER DISABILITIES IS NOT A PERMISSIBLE JUDICIAL RESOLUTION OF CALIFORNIA'S DISCRIMINATORY POLICY. 14

A. Extension Is Inappropriate Under Principles of Federalism. 14

B. Extension Is Not Required By Any Federal Law Or Policy. 16

C. Extension Is Disfavored Under California Law. 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 17

Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7 (1983) 11

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 3,9,16

Arkansas v. Fairfield Communities Land Co., 260 Ark. 277, 538 S.W.2d 698 (Ark. Sup. Ct.), *cert. denied*, 429 U.S. 1004 (1976) 15

Arp v. Workers' Compensation Appeals Board, 19 Cal.3d 395, 138 Cal. Rptr. 293, 563 P.2d 849 (1977) 19

Burns v. Rohr, 346 F.Supp. 994 (S.D. Cal. 1972) 15

Caban v. Mohammed, 441 U.S. 380 (1979) 15

Califano v. Westcott, 443 U.S. 76 (1979) 15

Craig v. Boren, 429 U.S. 190 (1976) 15

Dothard v. Rawlison, 433 U.S. 321 (1977) 5,6

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 11

Geduldig v. Aiello, 417 U.S. 484 (1974) 9

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 8,19

Gomez v. Perez, 409 U.S. 535 (1973) 16

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 2,5

Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972) 15

Homemakers, Inc. of Los Angeles v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976) 15

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 5,6

Table of Authorities Continued

	Page
Levy v. Louisiana, 391 U.S. 68 (1968)	16
Local 28 of the Sheet Metal Workers' International Association v. EEOC, 54 U.S.L.W. 4984 (Sup. Ct. July 2, 1986)	7
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978)	6,17
Mathews v. Lucas, 427 U.S. 495 (1976)	15
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)	2
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	6
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977)	8
Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)	2,8,9
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)	14
Orr v. Orr, 440 U.S. 268 (1979)	6,20
Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)	13
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	12,14
Stanton v. Stanton, 421 U.S. 7 (1975)	6
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)	2
United Steelworkers of America v. Weber, 443 U.S. 193 (1979)	7
Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973)	12
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	6
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)	15

Table of Authorities Continued

	Page
Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975)	7
FEDERAL STATUTES AND REGULATIONS:	
29 U.S.C. § 206(d)(1)	16
42 U.S.C. § 2000e(k)	1,3
42 U.S.C. § 2000e(j)	2
42 U.S.C. § 2000e-2(a)	7
42 U.S.C. § 2000e-2(h)	5,16
42 U.S.C. § 2000e-7	2,12
42 U.S.C. § 2000h-4	2,12
Pub. L. No. 95-555 § 3, 92 Stat. 2076 (1978)	16
29 C.F.R. 1604 (Appendix)	18
LEGISLATIVE MATERIALS:	
S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977)	3,5,9,10,18
H.R. Rep. No. 948, 95th Cong. 2nd Sess. (1978)	3,5,8,9,10,13,18
110 Cong. Rec. 2607 (1964)	7
110 Cong. Rec. 7247 (1964)	7
110 Cong. Rec. 7213 (1964)	8
123 Cong. Rec. 29387 (1977)	10
123 Cong. Rec. 29643 (1977)	13,17
123 Cong. Rec. 29652-29655 (1977)	17
123 Cong. Rec. 29664 (1977)	18
123 Cong. Rec. 29663 (1977)	18
CALIFORNIA CONSTITUTION AND STATUTES:	
Cal. Const. art. IV, § 4	20
Cal. Const. art. IV, § 8	17
Cal. Gov't Code § 12945(a)	4
Cal. Gov't Code § 12945(b)(1)	4
Cal. Gov't Code § 12945(c)	4

Table of Authorities Continued

	Page
Cal. Gov't Code § 12945(e)	4
MISCELLANEOUS:	
B. Schlei & P. Grossman, *Employment Discrimination Law* (2d ed. 1983)	7,15
Williams, *Equality's Riddle: Pregnancy and The Equal Treatment/Special Treatment Debate,* 13 N.Y.L. Rev.L. & Soc. Change 325 (1984-1985)	4,20
Note, *Sexual Equality Under Pregnancy Discrimination Act,* 83 Colum. L. Rev. 690 (1983) ..	20

REPLY BRIEF FOR THE PETITIONERS

I

TITLE VII AND THE CALIFORNIA PREGNANCY DISABILITY LAW ARE NOT RECONCILABLE.

This case involves the question whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), permits the states to require employers to provide benefits to pregnant employees beyond those which they extend to employees affected by other conditions of temporary disability. California has adopted a "pregnancy disability leave statute" that requires employers to provide employees with a "disability benefits" package which "guarantee[s] job retention." (Res. Br. at 2, 42). The Court must determine whether this special accommodation to the interests of the employee affected by pregnancy is inconsistent with Title VII's requirement that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits . . . , as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

Respondents' problem is to overcome the straightforward language of Title VII and its uncommonly clear legislative history. They must convince this Court that when Congress declared that pregnancy must be treated by employers the same as other temporary disabilities similarly affecting the ability or inability to work, Congress actually meant that pregnancy may (or perhaps must) be treated unlike other temporarily disabling conditions. Thus, respondents argue that Title VII permits (and allows states to require) programs which go "a step beyond" Title VII and which assure to women the " 'right to engage in reproductive conduct' " while retaining a "guarantee of continued employment" beyond that made available to employees disabled from other conditions. (Res. Br. at 39, 27, 6).

Respondents insist on the one hand that the California pregnancy disability law does not mandate special or preferential treatment for pregnant employees. (Res. Br. at 19-20). However, they concede, as they must, throughout their brief that the California law does precisely that. They acknowledge that the California provision imposes "different approaches" which constitute an "appropriate addition to Title VII." (Res. Br. at 6, 7). California "supplements the protections manifested in Title VII" and "differs from Title VII" in that it addresses a problem "uniquely faced by women" by protecting the "opportunity to decide whether or not to have children without being vulnerable to loss of employment . . . ." (Res. Br. at 7, 16, 20 n.18, 21).

California's approach to the problem of discrimination based on pregnancy could have been a permissible legislative choice, provided it had been the course selected by the national legislature, or if it did not "require or permit" an employment practice which was made unlawful by Title VII, 42 U.S.C. §2000e-7, or a practice inconsistent with the purpose of Title VII, 42 U.S.C. §2000h-4. However, Congress moved in a fundamentally different direction and the two approaches are not compatible.

A. Pregnancy May Not Be Treated As A *Sui Generis* Condition Under Title VII.

Preferential treatment or the accommodation of the unique characteristics of protected groups is not a concept that Congress incorporated into Title VII in general,[1] *see McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), or into the PDA in particular, *see Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S.

[1] A limited exception is in the area of religious discrimination, where an employer is required by Title VII itself to make reasonable accommodation to an employee's religious beliefs. 42 U.S.C § 2000e(j); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

669, 682-85 (1983). As this Court stated in *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1084-85 n.14 (1983), "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles" and "to forbid special treatment of pregnancy . . . ."

Congress addressed the issue of sex discrimination on the basis of pregnancy by adopting a model of equal treatment between pregnancy and other conditions affecting the capacity to work, declaring that pregnancy may not be placed in a class by itself. The PDA unambiguously declares that pregnant workers "shall be treated the same for all employment-related purposes." 42 U.S.C. § 2000e(k). Congress could not have been more definite in rejecting "the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions." S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977), reprinted in Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of Pregnancy Discrimination Act of 1978, at 41 (Comm. Print) (herein after "Leg. Hist."); *see also* H.R. Rep. No. 948, 95th Cong., 2d Sess. 4-5 (1978), Leg. Hist. at 150 ("The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work."). As the Senate Report relates, "the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work." S. Rep. No. 331, *supra*, at 4, Leg. Hist. at 41.

California, on the other hand, determined that " 'equality' " cannot be attained " 'by decreeing that the sexes shall be treated exactly alike.' " (Res. Br. at 27). Adopting a model which requires "accommodating real differences" rather than one which requires that " 'similarly situated individuals be treated the same,' " California's pregnancy disability law requires that employers " 'recognize and

compensate for the different reproductive roles of the sexes.' " (Res. Br. at 44, 28).

Thus, the California law is more than a "supplement" to the federal law. (Res. Br. at 29). Congress required *equal* treatment between those similarly affected in their ability to work. California requires recognition and accommodation of *differences* based upon pregnancy by requiring disparate treatment.

In short, the California pregnancy disability law, which treats pregnancy as a *sui generis* condition,[2] cannot be reconciled with the PDA, which announces that "[p]regnancy is to be understood as a physical event comparable to other physical events which befall workers," and which directs that "pregnant workers are to be treated no worse—nor any better—than other 'similar' workers.' " Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 348 (1984-85).

B. Disparate Treatment Is Not An Appropriate Remedy For Disparate Impact.

Respondents maintain that the California pregnancy disability law merely supplements Title VII in general and the PDA in particular by compensating for an obstacle to full equality of employment opportunity for women: loss of work due to pregnancy. Respondents contend that the state law eliminates the disproportionately adverse impact

---

[2] That California regards pregnancy as *sui generis* is revealed by the fact that the law at issue is part of a broader measure setting special standards for pregnant workers in the employment context. Cal. Gov't Code §§ 12945(a), (b)(1), (c). Although employers covered by Title VII are exempt from most of those provisions, *id.* at § 12945(e), employers not covered by Title VII remain subject to the provisions that, for example, exempt non-Title VII employers from providing health insurance coverage for the medical costs of pregnancy, *id.* at § 12945(b)(1). *See* NOW Am. Br. at 14-17.

on female employees of "inadequate" disability leave policies. (Res. Br. at 5-6, 14-15, 19-21, 38).

Title VII has, of course, been held generally to prohibit neutral employment practices that have a significant adverse impact on statutorily protected groups and which cannot be justified by business necessity.[3] *E.g.*, *Dothard* v. *Rawlison*, 433 U.S. 321 329-30 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. at 430-36. But respondents have failed entirely to establish that California's pregnancy disability law is intended to overcome such a problem, or that it has selected a permissible means for doing so. The cure for the alleged disparate impact of such neutral practices on members of one group[4] is most assuredly not the im-

---

[3] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), exempts from disparate impact analysis the consequences that may result from the operation of a bona fide seniority system. *E.g.*, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 345-56 (1977). Similarly, given the language and legislative history of the statute, it also may well be that the disparate impact model also has no place under the PDA. *See, e.g.*, H.R. Rep. No. 948, *supra*, at 3, Leg. Hist. at 149; S. Rep. No. 331, *supra*, at 5, Leg. Hist. at 42. Indeed, the United States takes the position that "Congress intended to approve of all facially neutral employer disability policies." Noting the "contradictory answers" in the Equal Employment Opportunity Commission ("EEOC") Guidelines, the Solicitor General observes that the "better view is that the PDA's equal treatment mandate announced the overriding principle for Title VII compliance in the pregnancy context." (U.S. Am. Br. at 24 & n.12).

It is not, however, necessary to decide the question here. Whether or not the disparate impact approach is available under the PDA, is not at issue in this case; rather, the question presented goes to the validity of a state law permitting disparate treatment on the basis of pregnancy. Moreover, it has not been suggested that the disability leave policies or practices of petitioner California Federal Savings and Loan Association ("Cal Fed") have a disproportionately adverse affect on its female employees.

[4] As pointed out in petitioners' opening brief (Pet. Br. at 38 & n.18), the record in this case is barren of any evidence that a disability leave policy which does not provide up to four months of leave and guar-

plementation of a policy that overtly discriminates against members of another group. Thus, for example, while minimum height and weight requirements that adversely affect women applicants for employment may violate Title VII in some circumstances, *see Dothard* v. *Rawlison*, 433 U.S. at 331-32, the remedy is not an employment rule that exempts women but not men from the operation of the those standards. Such a practice would discriminate against

anteed reinstatement rights has a significant adverse effect on pregnant workers or women employees. Respondents' reply refers only to "national statistics," which they maintain are "irrefutable," and which they assert "unquestionably support the California Legislature's presumption of adverse impact." (Res. Br. at 17).

But the statistics offered (Res. Br. at 17-18 & nn.11-15) at best indicate that "eighty-five percent of women in the work force will become pregnant in their lifetime." (*Id.* at 18). These "national statistics" are not evidence that female employees are disadvantaged by a comprehensive disability leave policy that, like petitioner Cal Fed's, treats pregnancy the same as other disabling medical conditions. As such a comparison is the key to any disparate impact analysis, *see, e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 348-49, the California legislature's supposed presumption of adverse impact may well be nothing more than the product of "archaic and overbroad generalizations about women"—the types of stereotypical assumptions that this Court has repeatedly "found insufficient to justify a gender-based classification" under the Equal Protection Clause. *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 730 n.16 (1982); *Orr* v. *Orr*, 440 U.S. 268 (1979); *Stanton* v. *Stanton*, 421 U.S. 7 (1975). The Court has refused to credit the "mere recitation of a benign, compensatory purpose" as justifying gender-based discrimination. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975).

Although no equal protection issue is presented here, similar considerations arise when a state seeks to defend from preemption under Title VII a state law that is on its face discriminatory. Before the State of California, or any other state, is permitted to introduce classifications based upon pregnancy, it should be required to document that its conclusive presumption as to adverse impact is real and not merely hypothetical. *See Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 707 (1978) ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females.").

male applicants on the basis of their sex in plain violation of Title VII.[5] 42 U.S.C. § 2000e-2(a).

C. Discrimination Against Non-Pregnant Employees Is Sex Discrimination Prohibited By Title VII.

There is no merit in the contention of certain amici, echoed by respondents, that preferential treatment of pregnant women is not proscribed by the PDA because "non-pregnant persons do not come within the purview of the statute." (Nat. Conf. State Leg. Am. Br. at 8; *see* Res. Br. at 37-39). That approach is based upon the erroneous premise that discrimination against non-pregnant persons is not sex discrimination under Title VII, as amended by the PDA, because "both men and women can be non-pregnant."[6] (Nat. Conf. State Leg. Am. Br. at 9).

[5] This Court has recently held that Title VII does not foreclose special preferences "when necessary to remedy past discrimination." *Local 28 of the Sheet Metal Workers' International Assoc.* v. *EEOC*, 54 U.S.L.W. 4984, 4998 (Sup. Ct. July 2, 1986); *see id.* at 5000 (Powell, J., concurring in part and concurring in the judgment); *see also United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979). Respondents do not claim, however, that the California pregnancy disability law was designed to remedy the effects of past discrimination.

[6] The amici subscribing to this view also postulate (Nat. Conf. of State Leg. Am. Br. at 7-9) that pregnancy is not a "universal" characteristic, and that discrimination against non-pregnant persons is thus not discrimination on the basis of pregnancy. Not all people profess religious beliefs; however, Title VII prohibits discrimination in favor of persons with religious beliefs and against non-religious persons. 110 Cong. Rec. 2607 (1964) (remarks of Rep. Celler); *Young* v. *Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975); B. Schlei & P. Grossman, *Employment Discrimination Law* 209 & nn. 20-24 (2d ed. 1983); *see also* 110 Cong. Rec. at 7247 (remarks of Senator Case).

Nor is the concept of discrimination under Title VII as elusive or as complex as amici's arguments indicate. "To discriminate is to make a distinction, to make a difference in treatment or favor," among similarly situated individuals based upon some prohibited characteristic. 110 Cong. Rec. at 7213 (interpretative memorandum of Senators Clark and Case). Here, the California pregnancy disability law discriminates

The judgment that a distinction based upon pregnancy is not gender-based discrimination was precisely the holding of the majority in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), which Congress emphatically rejected through the PDA. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. at 678. The sole difference between the views of respondents (and their amici) and the *Gilbert* decision is the claim that the PDA only overrules the holding in *Gilbert* to the extent of barring discrimination against pregnant workers.

The PDA, however, reflects congressional "disapproval of both the holding and the reasoning" of the *Gilbert* decision.[7] *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. at 678. This Court has held that Congress intended to adopt the views of the *Gilbert* dissenters, *id.* at 678-80, who asserted that the special treatment of pregnancy constitutes sex discrimination because "it is the capacity to become pregnant which primarily differentiates the female from the male," *Gilbert*, 429 U.S. at 162 (Ste-

in violation of the PDA because it parcels out rights among similarly situated employees on the basis of "pregnancy," that is, on the basis of sex.

[7] If, as respondents argue and the court of appeals held (Pet. App. at 10), the PDA permits unequal but favorable treatment of pregnancy in the workplace, states can require employers to adopt, or employers could voluntarily adopt, policies establishing a two-tier system of benefits or rights for pregnancy related and non-pregnancy related disabilities. An employer could, *inter alia*, provide paid leave only for employees disabled by pregnancy, and require the forfeiture of seniority during periods of disability leave, except for pregnancy disability leave.

These examples are the converse of the practices involved in *General Electric Co.* v. *Gilbert*, 429 U.S. at 128-29, and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 138-39 (1977). The PDA was, of course, intended to overrule the holding in and rationale of *Gilbert* and to eliminate the confusion caused by the Court's efforts in *Satty* to distinguish *Gilbert*. H.R. Rep. No. 948, *supra*, at 2-3, Leg. Hist. at 148-49. Respondents would have the Court return matters to the very state of affairs that Congress sought to remedy by the PDA.

vens, J., dissenting); *see also Arizona Governing Committee* v. *Norris*, 463 U.S. at 1084 n.14. For Title VII purposes, Congress aligned itself with the view that the "dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." *Geduldig* v. *Aiello*, 417 U.S. 484, 501 (1974) (Brennan, J., dissenting); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. at 678-79 & n.17.

Congress plainly intended that "[p]regnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute." H.R. Rep. No. 948, *supra*, at 4, Leg. Hist. at 150; *see* Pet. Br. at 20-25. Indeed, the notion that the PDA amended Title VII only to protect pregnant employees is squarely incompatible with *Newport News'* holding that the PDA simply re-enacted Congress' original intent (which had no separate category for pregnancy). This Court declared in *Newport News* that "[p]roponents of the [PDA] stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers." 462 U.S. at 681 (emphasis in original).

D. Congress Did Not Endorse State Laws That Provide Special Preferences For Pregnant Employees.

Contrary to respondents' assertions (Res. Br. at 35-36), the references in the Senate and House committee reports to state "laws which specifically refer to pregnancy" (S. Rep. No. 331, *supra*, at 3, Leg. Hist. at 40; *see also* H.R. Rep. No. 948, *supra*, at 10-11, Leg. Hist. at 156-57) do not reflect a congressional endorsement of laws that create special preferences for pregnant employees. In the express language of the statute and repeatedly in the committee reports, as well as during floor debate, Congress described the PDA as adopting "as its standard equality of treat-

ment," 123 Cong. Rec. at 29387, Leg. Hist. at 67 (remarks of Senator Javits), and as requiring that "pregnant women be treated the same as other employees on the basis of their ability or inability to work," S. Rep. No. 331, *supra*, at 4, Leg. Hist. at 41. The occasional and inconclusive references to various "state laws" in the House and Senate reports fall far short of evidencing an intention to permit discrimination in favor of pregnant employees.

None of the state laws cited in either the House or Senate reports is described as creating a preference or as providing disability coverage for pregnant employees not provided to similarly situated non-pregnant employees. For example, the House Report states that "fringe benefit coverage of workers disabled by pregnancy and related conditions takes two basic forms under State law: (1) a provision for coverage in some form under a State disability insurance law [or] (2) a requirement of *equal* treatment of pregnant workers under a State fair employment practices law." H.R. Rep. No. 948, *supra*, at 10, Leg. Hist. at 156 (emphasis added).

Furthermore, the references to the then existing state laws in the Senate and House reports generally occur in the context of discussions concerning whether the enactment of federal legislation would increase the costs to employers, a concern that the House Report dismissed as having "little or no economic impact" because "many employers are *already* under a State law obligation to provide benefits to pregnant disabled workers." H.R. Rep. No. 948, *supra*, at 11, Leg. Hist. at 157 (emphasis in original). Even in this context, the Senate Report speaks in terms of costs "associated with a policy of *nondiscrimination* . . . in States which have already mandated a policy of *nondiscrimination*." S. Rep. 331, *supra*, at 11, Leg. Hist. at 48 (emphasis added).

II

THE CALIFORNIA PREGNANCY DISABILITY LAW IS PREEMPTED BY TITLE VII.

A. Title VII Preempts State Laws That Permit Employment Practices Prohibited By Title VII.

Respondents erroneously claim that the California pregnancy disability law does not conflict with federal law and is thus not preempted because the state law "nowhere requires employers to prefer pregnant employees."[8] (Res. Br. at 20). This contention is squarely inconsistent with respondents' argument that special treatment *must* be given to " 'accommodate pregnancy' " because only women experience pregnancy. (Res. Br. at 43). Moreover, under respondents' logic, a state statute that establishes a minimum wage of $4.00 per hour for employees who have immigrated from a certain country and $3.50 per hour for all other employees would not be preempted by Title VII because the statute does not mandate that any employees actually be paid at the lower rate.

Respondents fail to appreciate that Title VII's preemptive reach extends beyond state laws that *require* discriminatory practices. While Title VII does not preempt state

---

[8] Respondents incorrectly maintain (Res. Br. at 7-10) that because Title VII does not occupy the field to the exclusion of all state regulation of employment discrimination, a state law is preempted only if it "irreconcilably" conflicts with federal law. The cases relied upon by respondents for that proposition (*e.g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963)) all involve the question whether a state law should be subordinated to federal law even though Congress has not expressly provided for preemption. *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 12 n.5 (1983). The rules in those "implicit pre-emption" cases—in which state law will be ousted if it is in irreconcilable conflict with federal law—have "little application" where, as here, Congress has expressly provided for preemption of specific state laws. *Id.* The proper test when Congress has explicitly spoken is whether the state law falls within the category of state legislation specifically preempted. *Id.* at 12.

laws that prohibit conduct permitted under federal law, *see Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 103 (1983), the contrary is not true: states may not enact laws that "require" or "permit" conduct that "would be an unlawful employment practice under [Title VII]." 42 U.S.C. § 2000e-7. Congress did not intend to leave standing state laws that encourage or suggest that discriminatory practices have some sort of legal sanction. *See* 42 U.S.C. 2000h-4 (invalidating state laws that are "inconsistent with any of the purposes" of any Title of the 1964 Civil Rights Act). Thus Section 708 of Title VII, 42 U.S.C. § 2000e-7, preempts state laws that, like the California pregnancy disability law at issue here, *permit* an employer to provide a legally required employment benefit on a discriminatory basis.

If, as respondents maintain (Res. Br. at 21), preemption only occurs when compliance with both Title VII and the state law is a "physical impossibility," the term "permit" in Section 708 of Title VII would lose independent meaning as it would be merely redundant of the term "require."[9] It is a settled rule of statutory interpretation that a statute should be read to give effect to all its provisions so that no term becomes superfluous. *E.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973).

B. The Same Preemption Standard Applies To State Laws Dealing With Pregnancy Discrimination.

Similarly unfounded is respondents' contention (Res. Br. at 39-44) that the references to state laws in the legislative history of the PDA evidence an intent by Congress to allow the states greater latitude in regulating employment discrimination on the basis of pregnancy. There is no evi-

[9] Although the term "permit" has different shades of meaning (*see* AFL-CIO Am. Br. at 12), its use in Section 708 as a counterpoint to the term "require" indicates that Congress employed it in its generally understood sense as meaning "let," "allow," or "to acquiesce, by failing to prevent." *Black's Law Dictionary* 1298 (4th ed. 1968).

dence to suggest that Congress intended to depart from Title VII's regular preemption standard for state laws dealing with pregnancy and employment.

Indeed, Congress recognized that as a result of the patchwork of local laws dealing with pregnancy discrimination "employers who operate in several States face different requirements depending on the State," and that the "rights of pregnant employees depend on the laws of the State in which they are employed." H.R. Rep. No. 948, *supra*, at 11, Leg. Hist. at 157. As Senator Williams made clear during a colloquy with Senator Hatch on the relationship between the PDA and state laws, "the title VII test would apply. . . ." If "States attempted to permit what this legislation [the PDA] . . . would prohibit, obviously Federal law would prevail, if there were a clear conflict." 123 Cong. Rec. at 29643, Leg. Hist. at 79. Such a preemptive conflict would arise if the state law "operate[s] to permit or require discrimination" on account of pregnancy. *Id.* (remarks of Senator Williams).

C. Compliance With Both Federal and State Laws Is A Significant Concern Under Title VII's Enforcement Scheme.

Contrary to respondents' attempt to dismiss it as "irrelevant" (Res. Br. at 20-21 n.19), an employer's compliance with both Title VII and state law is of significant concern in any preemption analysis. Although not full partners, states play an important role in enforcing Title VII. Under Title VII's enforcement scheme, state agencies have the initial opportunity "to resolve problems of employment discrimination and thereby to make unnecessary resort to federal relief by victims of the discrimination." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755 (1979). As this Court has previously observed, "Congress envisioned that Title VII's procedures and remedies would 'mes[h] nicely, logically, and coherently with the State and city legislation,' and that remedying employment discrimination would

be an area in which '[t]he Federal Government and the State governments could cooperate effectively.' " *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63-64 (1980), quoting 110 Cong. Rec. 7205 (1964) (remarks of Senator Clark).

A state law, like the California pregnancy disability law, that requires a practice which, standing alone, violates Title VII does not "mesh" at all with federal law, let alone "nicely," "logically," or "coherently." The resulting disruption of the enforcement scheme contemplated by Congress would impair Title VII's operation. *Cf. Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 101-02.

III

EXTENDING CALIFORNIA'S PREGNANCY BENEFITS TO OTHER DISABILITIES IS NOT A PERMISSIBLE JUDICIAL RESOLUTION OF CALIFORNIA'S DISCRIMINATORY POLICY.

Some of the organizations filing briefs in this case (NOW Am. Br. at 20-32; ACLU Am. Br. at 48-63; Nat. Conf. of State Leg. Am. Br. at 28; *see also* AFL-CIO Am. Br. at 16-19) urge that even if the California pregnancy disability law conflicts with the paramount federal legislation, the remedy is not to invalidate the state law but to extend its benefits to all California employees for all temporary disabilities. Notable for its unwillingness to take that position is the State of California,[10] whose legislature has the power to enact such legislation, but which has just recently declined to do so (*see infra* at 18-20).

A. Extension Is Inappropriate Under Principles Of Federalism.

None of the advocates for extending California's pregnancy benefits to all employees pays adequate regard to

[10] "[R]espondents do not argue that extension of California's statute is required . . . ." (Res. Br. at 21 n.20)

bedrock constitutional principles of federalism, which make that solution highly inappropriate in this case. *See* cases cited Pet. Br. at 44-45. Out of respect for the separate sovereignty of the states, this Court has declined to rewrite state statutes found to be underinclusive, leaving to the respective state legislatures or the appropriate state courts the task of deciding whether the defective state law should be remedied by extension. *E.g., Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142, 152-53 (1980); *Craig* v. *Boren*, 429 U.S. 190, 210 n.24 (1976). The cases cited by the amici for the proposition that extension is a regular and normal remedy (*see, e.g.*, cases cited NOW Am. Br. at 27; ACLU Am. Br. at 61-62) involved challenges to underinclusive federal benefit statues where federalism principles were not implicated and the intent of Congress reasonably ascertainable.[11] *Compare Califano* v. *Westcott*, 443 U.S. 76, 89-90 (1979) with *Caban* v. *Mohammed*, 441 U.S. 380, 392-93 n.13 (1979); *see also Mathews* v. *Lucas*, 427 U.S. 495, 515-16 (1976).

Extension is most inappropriate where, as here, the result would be to create a rule of general applicability,

[11] The amici also cite *Hays* v. *Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972), in which the Eighth Circuit avoided preemption by extending the coverage of an Arkansas statute that provided for premium pay only for women. The decision in *Hays* has not been followed by other federal courts faced with Title VII preemption questions, *Homemakers, Inc. of Los Angeles* v. *Division of Industrial Welfare*, 509 F.2d 20, 25 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976); *Burns* v. *Rohr Corp.*, 346 F. Supp. 994, 997 (S.D.Cal. 1972), and has been criticized by learned commentators, B. Schlei and P. Grossman, *Employment Discrimination Law, supra*, at 369. As petitioners pointed out earlier (Pet. Br. at 46 n.26), *Hays* illustrates the confusion and uncertainties resulting when a federal court attempts to anticipate state law questions. *See Arkansas* v. *Fairfield Communities Land Co.*, 260 Ark. 277, 278, 538 S.W.2d 698, 699 (Ark. Sup. Ct.) (noting that the federal courts had not fully appreciated controlling aspects of state law), *cert. denied*, 429 U.S. 1004 (1976).

which may involve sundry policy, administrative and definitional questions that only the state legislature can answer. The Court has resorted to "extension" only in the case of an otherwise comprehensive state law, and then only in narrow, limited circumstances. *See, e.g., Gomez* v. *Perez*, 409 U.S. 535 (1973) (right to sue for support extended to illegitimate children); *Levy* v. *Louisiana*, 391 U.S. 68 (1968) (right to sue for wrongful death of parent extended to illegitimates).

B. Extension Is Not Required By Any Federal Law or Policy.

The argument set out in some of the amici briefs (NOW Am. Br. at 20-27; ACLU Am. Br. at 52-58) that Section 3 of the PDA,[12] which provided for a transitional period for compliance with the new statute, requires extension of the California statute to all employees is without the slightest merit. While Section 3 prohibited an employer from reducing benefits as a method of complying with the PDA, that provision relates to "fringe benefit fund[s] or insurance program[s]" paid for or contributed to by the employer, and operated only for a one-year transition period from the enactment of the PDA. The one-year bar expired long ago, and petitioner Cal Fed never provided different levels of disability leave or reinstatement rights to pregnant and non-pregnant workers. It thus had no occasion to "reduce" any employee's disability leave rights.[13] Finally, while the California pregnancy disability law was

[12] Pub. L. No. 95-555, § 3, 92 Stat. 2076, 2077 (1978).

[13] The Equal Pay Act, 29 U.S.C. § 206(d)(1), which forbids employers to cure violations of the Act by reducing the wage rate of employees, does not require an employer to "top up" disability leave rights by adopting the special treatment provisions of the California pregnancy disability law as the standard for all employees. *Cf. Arizona Governing Committee* v. *Norris*, 463 U.S. at 1111 n.4 (O'Connor, J., concurring) ("[A]lthough the Bennett Amendment of Title VII, 42 U.S.C. 2000e-2(h), incorporates the Equal Pay Act . . . , the Equal Pay Act proviso seems to apply only to wages.").

passed one month prior to the PDA, it was not effective until January 1, 1979 (*see* Cal. Const. art. IV, §8), two months after the PDA. Thus, the California provisions are not at all relevant to Section 3 of the PDA.

Amici also maintain (*e.g*, NOW Am. Br. at 22-27; ACLU Am. Br. at 52-58) that normal Title VII remedial principles require the prospective extension of benefits to the disfavored sex. While generally the appropriate remedy where an employer has engaged in discriminatory behavior, *see Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. at 718-23; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), that rule has no application here. Either petitioners are correct that the California pregnancy disability law is preempted by Title VII and the state law was void *ab initio*, or the state law is not preempted because the PDA does not preclude special treatment for pregnant employees. In either case, non-pregnant employees are not entitled to the California law's special benefits.

Amici also misunderstand Title VII's preemptive effect on state laws that utilize pregnancy as a criterion for allocating benefits. *See* NOW Am. Br. at 22-26. Where state law establishes an employment rule of general applicability, pregnant employees are entitled under the PDA to receive the benefits of that practice. *See* 123 Cong. Rec. at 29643, Leg. Hist. at 78-79 (remarks of Senators Williams and Hatch); *see also id.* at 123 Cong. Rec. at 29652-29655, Leg. Hist. at 102-111 (remarks of Senators Hatch, Williams, and Javits). Where, however, the state law treats pregnant employees more favorably than the employment rule of general applicability, it is the special treatment aspect of the state law that is discriminatory and preempted by Title VII. In this way, "women disabled due to pregnancy" are "provided the same benefits as those provided other disabled workers." H.R. Rep. No. 948, *supra*, at 5, Leg. Hist. at 151.[14]

[14] Although amici NOW *et. al* try to use them as contrary authority

Non-pregnant workers are not entitled to unlegislated increases in benefits arising from state laws that treat pregnancy in a preferential or *sui generis* fashion. S. Rep. No. 331, *supra*, at 4, Leg. Hist. at 41. As petitioners pointed out in their opening brief (Pet. Br. at 46-47), in enacting the PDA Congress repeatedly emphasized that employers should be free to provide any level of disability benefits—or no benefits at all—so long as pregnancy was not a standard for allotting those benefits among the workforce. *See, e.g.*, S. Rep. No. 331, *supra*, at 4, Leg. Hist. at 41; H.R. Rep. No. 948, *supra*, at 4, Leg. Hist. at 150; 123 Cong. Rec. at 29664, Leg. Hist. at 135 (remarks of Senator Brooke); *id.* at 29663, Leg. Hist. at 133 (remarks of Senator Culver); *see also* U.S. Am. Br. at 14-15 and nn.5&6. "In the face of such overwhelming expressions of congressional intent, . . . [it] cannot [be] suppose[d] that Congress intended the PDA to work in tandem with state laws to produce the precise effect that Congress stated the PDA would not have: forcing an employer who did not provide disability benefits to provide them."[15] (U.S. Am. Br. at 26).

C. Extension Is Disfavored Under California Law.

The assertion that the California pregnancy disability law should be extended because there is no evidence of a

(NOW Am. Br. at 23-25), the EEOC Guidelines are wholly consistent with this approach. Where state law mandates that employers provide certain benefit levels for disabled employees, the Guidelines properly require that the employer provide the same level of benefits to pregnant workers. *See* 29 C.F.R. 1604 (Appendix) (Question & Answer No. 19). Guideline Answer to Question 29 is not to the contrary for it does not deal with the effect of a state mandated right or benefit level that operates in a discriminatory fashion.

[15] There is thus no merit in the position (NOW Am. Br. at 3-4) that the "extension versus invalidation" issue has become confused because petitioners have brought an "upside down" Title VII suit, and that the result would have been different if a male employee had brought suit. There is no basis for supposing that this Court would impose a different remedy simply because of the posture of the litigation.

contrary intent by the California legislature (Nat. Conf. of State Leg. Am. Br. at 25-20) misstates the governing test under state decisional law. The California Supreme Court has declared that extension is a "drastic alternative," to be pursued only when supported by clear evidence of a legislative intent favoring extension. *Arp.* v. *Workers' Compensation Appeals Board*, 19 Cal.3d 395, 407, 138 Cal. Rptr. 293, 563 P.2d 849 (1977). The state law was intended to overrule the *Gilbert* holding,[16] and was not just a step in a long-term goal towards universal disability leave coverage.

The claim (NOW Am. Br. at 27-31) that the California legislature's commitment to protecting pregnant women was so "intense" that it would favor extension over invalidation is total speculation. Of course California was "committed" to the law that it did pass, but its attitude toward extension is not manifest except for its failure to enact such a provision in the session of the California legislature just ended. That bill (AB3340) would have given temporarily disabled non-pregnant employees leave and reinstatement rights comparable to those now only provided pregnant employees.[17] If the people of California

[16] Res. Br. at 3; *see* Enrolled Bill Report, Agriculture and Services—Industrial Relations (Sept. 11, 1978) at 1. ("This bill is an attempt to legislatively 'overrule' the decision of the United States Supreme Court in *General Electric Co.* v. *Gilbert* . . . .").

[17] AB 3340 was introduced by Assembly Member Maxine Waters in February 1986. The bill passed the Assembly on June 9, 1986, and was sent to the State Senate where it was referred to the Committee on Industrial Relations, which on August 15, 1986 voted in favor of the bill. The measure was then sent to the Senate Committee on Appropriation where it was pending when the regular legislative session ended on September 15, 1986.

While the Governor has convened a special session of the California legislature, "[w]hen so assembled" the legislature "has power to legislate only on the subjects specified" in the Governor's proclamation calling for the special session. Cal. Const. art. IV, § 4. The September

want such a law, the California legislature is the most appropriate medium for its enactment.

CONCLUSION

As this Court has observed, laws which require special treatment on the basis of sex tend to perpetuate restrictive and ultimately detrimental stereotypes. *Orr v. Orr*, 440 U.S. at 283. In 1978, Congress rejected the view that employers may isolate pregnancy for separate treatment, and deliberately and explicitly engrafted an equal treatment provision for pregnancy onto Title VII, "quite plainly requiring that pregnancy be treated under the equality model."[18] That law demands that pregnancy be treated no different than other disabling conditions. Those who advocate special treatment for pregnancy to "rectif[y] the natural assymetry of the sexes,"[19] must re-address their policy arguments to the political branch that rejected them eight years ago.

Respectfully submitted.

WILLARD Z. CARR, JR.
*THEODORE B. OLSON
PAMELA L. HEMMINGER
PAUL BLANKENSTEIN
JAN E. EAKINS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioners
**Counsel of Record*

8, 1986 proclamation convening the special session listed "prison legislation" as the only subject for action.

[18] Williams, *supra*, at 347-48.

[19] Note, *Sexual Equality Under Pregnancy Discrimination Act*, 83 Colum. L. Rev. 690, 721 (1983).

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

In the Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., PETITIONERS

v.

MARK GUERRA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

MICHAEL A. CARVIN
Deputy Assistant Attorney General

RICHARD J. LAZARUS
Assistant to the Solicitor General

BRIAN K. LANDSBERG
DAVID K. FLYNN
MARY E. MANN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a state law requiring employers to provide disability leave and reinstatement rights to employees disabled on account of pregnancy, childbirth, or related medical conditions is preempted by Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument:	
Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, preempts a state law that requires employers to provide special employment-related benefits to pregnant female employees	7
A. Title VII, as amended by the PDA, expressly preempts state laws that are inconsistent with the purposes of Title VII, including state laws purporting to require or permit employer practices that are unlawful under Title VII	8
B. Title VII, as amended by the PDA, requires employers to treat male and female employees equally and equates classifications based on pregnancy with sex discrimination	10
C. The California Pregnancy Disability Law discriminates on the basis of sex within the meaning of Title VII, as amended by the PDA, because it requires an employer to provide disability leave and certain reinstatement rights to pregnant female employees, regardless of the employer's policy towards other disabled employees	16
D. Preemption may not be avoided by construing either the California Law or Title VII to require that employers provide equal disability leave or reinstatement rights to non-pregnant employees	25
Conclusion	27

TABLE OF AUTHORITIES

Cases:	
Arizona Governing Committee v. *Norris*, 463 U.S. 1073	11, 18, 19
Braunstein v. *Commissioner*, 374 U.S. 65	10
Connecticut v. *Teal*, 457 U.S. 440	22
Geduldig v. *Aiello*, 417 U.S. 484	10, 18
General Electric Co. v. *Gilbert* 429 U.S. 125	10

Cases – Continued: Page

Griggs v. *Duke Power Co.*, 401 U.S. 424 21
Harris v. *McRae*, 448 U.S. 297 18
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 ..... 12, 13
Hillsborough County v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985) 8, 9
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 21
Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702 ..... 18, 19, 20, 22
Maine v. *Thiboutot*, 448 U.S. 1 18
Michigan Canners & Freezers Ass'n v. *Agricultural Marketing & Bargaining Bd.*, No. 82-1577 (June 11, 1984) 10, 17
Nashville Gas Co. v. *Satty*, 434 U.S. 136 21
Newport News Shipbuilding & Dry Dock Co. v. *EEOC*, 462 U.S. 669 ..... 4-5, 11, 12, 14, 20
Orr v. *Orr*, 440 U.S. 268 22
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 9
Wengler v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 25

Constitution, statutes and regulation:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 4
42 U.S.C. 2000e(j) 20
42 U.S.C. 2000e(k) (§ 701(k) 5, 12, 17
42 U.S.C. 2000e-2(i) 20
42 U.S.C. 2000e-5(a) 1
42 U.S.C. 2000e-5(f)(1) 1
42 U.S.C. 2000e-7 (§ 708) 7, 9, 18
42 U.S.C. 2000e-16 2
42 U.S.C. 2000h-4 (§ 1104) 6, 9, 18
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 *et seq.* 1, 4, 5
California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900 *et seq.* (West 1980) 2
§ 12945(b)(2) 2, 16
29 C.F.R. Pt. 1604:
Section 1604.10(b) 15-16
Section 1604.10(c) 24
App. 16

Miscellaneous: Page

123 Cong. Rec. (1977):
p. 7539 14
p. 7541 14
p. 8145 15
p. 10582 14
p. 21435 11
p. 29385 14
p. 29388 14
pp. 29650-29656 23
p. 29652 12
pp. 29652-29653 23
p. 29653 ..... 12, 23
pp. 29653-29654 12
p. 29654 ..... 11, 21
p. 29655 23
p. 29663 15
p. 29664 15
124 Cong. Rec. (1978):
p. 21435 11
p. 36817 11
p. 36819 11
37 Fed. Reg. (1972):
p. 6836 24
p. 6837 24
44 Fed. Reg. 13278 (1979) 24
H.R. Rep. 95-948, 95th Cong., 1st Sess. (1977) 11, 13, 14, 21, 23
S. Rep. 95-331, 95th Cong., 1st Sess. (1977) 11, 13, 14, 21
Developments in the Law – Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971) 18, 19

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-494

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., PETITIONERS

v.

MARK GUERRA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the validity of a state law that requires employers to provide employees disabled on account of pregnancy, childbirth, or related medical conditions with disability leave (up to four months) and certain reinstatement rights. Petitioners contend that the state law is preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, as amended by the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076 *et seq.* The PDA generally provides that discrimination on the basis of pregnancy constitutes sex-based discrimination within the meaning of Title VII (see 42 U.S.C. 2000e(k)).

The United States has a strong interest in the Court's disposition of the preemption issue. The Attorney General and the Equal Employment Opportunity Commission have substantial enforcement responsibilities under Title VII (42 U.S.C. 2000e-5(a), 2000e-5(f)(1)), and the federal government is obligated to comply with Title VII in its

capacity as the nation's largest employer (42 U.S.C. 2000e-16). The meaning of the PDA, including its preemptive scope, potentially affects both of these concerns. Indeed, the Court previously recognized the government's interest by inviting the Solicitor General to express the views of the United States in another case, *Miller-Wohl Co.* v. *Commissioner of Labor & Industry*, No. 84-1545, that presented an essentially identical preemption question.

STATEMENT

Petitioners, a savings and loan association (Cal Fed) and two non-profit corporations, brought this action for injunctive and declaratory relief against respondents, California officials and agencies in charge of implementing equal employment and anti-discrimination laws, alleging that a California law requiring employers to provide certain disability benefits and reinstatement rights to pregnant female employees was preempted by federal law. The district court granted summary judgment in favor of petitioners, but the court of appeals reversed and remanded with instructions to grant respondents' motion for summary judgment.

1. The California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900 *et seq.* (West 1980), provides, in pertinent part, that, absent a "bona fide occupational qualification," it is an unlawful employment practice "[f]or any employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical condition * * * [t]o take a leave on account of pregnancy for a reasonable period of time" (Cal. Gov't Code § 12945(b)(2)). The statute defines "reasonable period of time" as "that period during which the female employee is disabled[,]" not to exceed four months (*ibid.*). Respondents have construed the state law as requiring an employer to reinstate the employee to her same job, unless the employer establishes that nonreinstatement is justified by "business necessity," which includes overcoming a rebuttable presumption that the pregnant employee's job can be held open or filled by a temporary replacement during the leave period (Pet. App. E16). And even if the employer can meet the "business necessity" standard, the employer is still obliged to "make a reasonable, good faith effort to return the employee to a substantially similar job" (*ibid.*) Respondents do not, however, construe the state law as barring an employer from conditioning eligibility for disability leave on account of pregnancy on completion of a three-month probationary period, so long as such a requirement applies equally to employee eligibility for disability leave on account of other medical conditions (*id.* at E11).

Petitioner Cal Fed treats its pregnant and nonpregnant workers equally with respect to the availability of disability leave. It provides unpaid disability leave to all employees who have completed a three-month probationary period (Pet. App. E6-E7). When the leave period is complete, Cal Fed reinstates the employee to his previous job, if it is available; if it is not, the employer places the employee in a similar job (*id.* at E6). Should no suitable or similar position be available, Cal Fed reserves the right to terminate employment (*ibid.*). Cal Fed does not guarantee the employee on leave, whether on account of pregnancy or of any other medical condition, either reinstatement rights to the same job or reasonable employer efforts to place the employee in a similar job, should business necessity bar reinstatement. The leave policies of the other petitioners similarly do not provide any such assurances of reinstatement or alternative placement (*id.* at E7).

2. In May 1983, respondent California Department of Fair Employment and Housing (Department) issued an administrative accusation against Cal Fed on behalf of

Lillian Garland, a Cal Fed employee whom Cal Fed had not reinstated at the conclusion of her pregnancy leave (Pet. App. E8). The Department sought an order from respondent California Fair Employment and Housing Commission (Commission) to compel Cal Fed to modify its disability leave policy to conform to California law (*ibid.*).

Petitioners thereafter filed this action for injunctive and declaratory relief in the United States District Court for the Central District of California, alleging that the California pregnancy law—by requiring that employers provide certain disability leave and reinstatement rights to disabled pregnant employees—permits or requires unlawful sex discrimination and, accordingly, is preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, as amended by the Pregnancy Discrimination Act of 1978 (Pet. App. A3). The district court granted summary judgment in favor of petitioners (*id.* at E1-E20), ruling that the state law is "inconsistent with the purpose of Congress in enacting the Pregnancy Discrimination [Act] to eliminate classifications based on pregnancy and with the purpose of Title VII to provide equal treatment for males and females[,]" because the law requires preferential treatment of female employees (*id.* at E14). Accordingly, the court held that the state law is void under the Supremacy Clause and permanently enjoined respondents from enforcing the law in a manner inconsistent with federal law (*id.* at E1-E3).

3. The court of appeals reversed (Pet. App. A1-A11).[1] Disagreeing with the district court's reading of this Court's decision in *Newport News Shipbuilding & Dry Dock Co.*

[1] In addition to issuing a published opinion on the merits, the court of appeals issued a separate unpublished opinion that addressed certain procedural and jurisdictional issues raised in the litigation, not currently contested by the parties before this Court (Pet. App. B1-B4). The court also subsequently amended a footnote in its published opinion (*id.* at C1).

v. *EEOC*, 462 U.S. 669 (1983), the court of appeals held that the decision did not support petitioners' position: "*Newport News* found that inadequate pregnancy coverage discriminated against females—wives—and against their husbands only because the husbands-employees' total benefit package was thereby diminished, while Cal Fed claims that adequate pregnancy leave discriminates against male employees—who do not get pregnant and whose total disability package suffers no consequent diminution" (Pet. App. A5). The court, while acknowledging a "tension" between the PDA's first clause (equating pregnancy discrimination with sex discrimination) and the second clause (apparently requiring pregnancy-neutral policies), concluded that Congress intended "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise" (*id.* at A10). The challenged state law was no more inconsistent with Title VII, as amended by the PDA, than "requiring greater dollar expenditures for women in order to achieve equally complete health care coverage for both sexes" (*ibid.*). "[E]quality under the PDA[,]" the court reasoned, "must be measured in employment opportunity, not * * * in amounts of days of disability leave expended" (*id* at A11).

SUMMARY OF ARGUMENT

When Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(k), it declared unequivocally that the nondiscrimination mandate of Title VII outlawed any difference in treatment, for any employment-related purpose, on grounds of pregnancy. The impetus for congressional action was, to be sure, the desire to eliminate employer practices that treated pregnancy less favorably than other disabilities, but Congress did not limit its actions to that narrow purpose. Instead, Congress extended

Title VII's prohibition of sex discrimination to include pregnancy discrimination and announced that equal treatment of male and female employees would remain the touchstone of compliance with the statute.

The California pregnancy disability law, challenged here, shares many of the same goals as the PDA, particularly protection of maternal and infant health. It achieves its purposes, however, in a manner that runs afoul of Title VII's nondiscrimination mandate. The California law singles out pregnant female employees for special treatment by requiring that employers guarantee those employees disability leave (up to four months) and certain reinstatement rights, regardless of the employers' disability policies towards other employees. As a result, the state law squarely conflicts with the preeminent principle of equal treatment of male and female employees generally announced by Title VII and specifically extended to pregnancy-based classifications by the PDA.

We do not question that Congress could rationally have excepted laws favoring pregnancy-related disabilities from Title VII's nondiscrimination mandate. The merits of petitioners' preemption challenge, however, do not depend on what Congress might have done, but look only to those measures enacted by Congress, including the relevant legislative history. Here, both the plain language of the PDA and its legislative history leave little doubt that Congress made no exception from Title VII's sweeping mandate, but instead insisted on strict adherence to the principle of nondiscrimination.

Faced with these unqualified expressions of congressional intent, we are compelled to conclude that Title VII, as amended by the PDA, preempts the California pregnancy disability law. The Civil Rights Act of 1964 expressly preempts state laws that are inconsistent with the purposes of the Act, including the provisions of Title VII (see 42 U.S.C. 2000h-4). In addition, Title VII itself ex-

pressly preempts state laws that "purport[] to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]" (42 U.S.C. 2000e-7). The California law fails both of these tests.

The decisions of this Court endorsing "disparate impact" analysis in Title VII cases provide no basis for avoiding preemption in this case. Disparate impact analysis is relevant only to evaluation of a particular employer's policies, to ensure that facially neutral employment practices are not "unequal" in operation; it cannot be used to justify a law of general application that explicitly favors one gender over the other. This is especially true in the pregnancy context because Congress enacted the PDA, insisting on equal treatment, largely to eliminate any need to rely on disparate impact analysis. Moreover, the clear conflict between the federal and state laws cannot be avoided by requiring employers to provide equal benefits to other (nonpregnant) disabled employees. Neither the California law nor Title VII, as amended by the PDA, can fairly be read to require employers to take such burdensome action. To the contrary, the language and legislative history of the PDA evidences Congress's firm intention to repudiate, not to accommodate, laws such as California's that discriminate on the basis of sex.

ARGUMENT

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT OF 1978, PREEMPTS A STATE LAW THAT REQUIRES EMPLOYERS TO PROVIDE SPECIAL EMPLOYMENT-RELATED BENEFITS TO PREGNANT FEMALE EMPLOYEES

Preemption of a state law rooted in a state's traditional police power authority to safeguard the health and safety of its citizens, particularly infant health, is not to be lightly undertaken. Still, when the method chosen by the state to

further its important objectives squarely conflicts with countervailing federal policy embodied in valid legislation, the state law must fail. After examining both the terms of the California pregnancy disability law, challenged here, and the mandate of Title VII, as amended by the PDA, we conclude that such a conflict is presented.

Simply put, the California pregnancy disability law furthers legitimate and important health and safety goals, but it does so in an impermissible manner. In Title VII, as amended by the PDA, Congress unambiguously announced the overriding principle that discrimination on the basis of sex, which includes discrimination on the basis of pregnancy, has no place in the employment relationship, absent bona fide occupational concerns. By singling out the disability of pregnancy for special treatment, the California law invites employers to discriminate on the basis of pregnancy, albeit favorably. If federal law were silent, we have no doubt that such state legislation favoring this class would pass constitutional muster. Congress has spoken unequivocally, however, and Title VII, as amended by the PDA, allows no exception from the mandate of equal treatment of male and female employees. Accordingly, we join petitioners in asking this Court to overturn the contrary ruling of the court of appeals.

A. TITLE VII, AS AMENDED BY THE PDA, EXPRESSLY PREEMPTS STATE LAWS THAT ARE INCONSISTENT WITH THE PURPOSES OF TITLE VII, INCLUDING STATE LAWS PURPORTING TO REQUIRE OR PERMIT EMPLOYER PRACTICES THAT ARE UNLAWFUL UNDER TITLE VII

In *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), this Court had recent occasion to discuss the contours of federal preemption. "It is a familiar and well established principle that the Supremacy Clause, U.S. Const., Art VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to'

federal law. *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.). Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) * * * * * Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises where 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines* v. *Davidowitz*, [312 U.S. 52, 67 (1941)]." *Hillsborough County*, slip op. 5.

The Civil Rights Act of 1964 includes specific provisions regarding its preemptive effect on state legislation. Section 1104 of the Act, 42 U.S.C. 2000h-4, provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

In addition, Title VII contains its own preemption provision, which "expressly preserves nonconflicting state laws" (*Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 101 (1983)). Section 708 of the Act, 42 U.S.C. 2000e-7, provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Accordingly, assessment of petitioners' preemption challenge requires, at the outset, examination of both the "purposes" of Title VII, as amended by the PDA, and the precise scope of employer practices proscribed by the federal law. Moreover, surface consistency between the stated purposes of the state and federal law does not end the preemption inquiry, which must extend to consideration of any conflict between the means chosen by the respective statutory schemes to further their purposes. See *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing & Bargaining Bd.*, No. 82-1577 (June 11, 1984), slip op. 15; cf. *Braunstein* v. *Commissioner*, 374 U.S. 65, 71 (1963).

B. TITLE VII, AS AMENDED BY THE PDA, REQUIRES EMPLOYERS TO TREAT MALE AND FEMALE EMPLOYEES EQUALLY AND EQUATES CLASSIFICATIONS BASED ON PREGNANCY WITH SEX DISCRIMINATON

1. Congressional enactment of the PDA in 1978, amending Title VII, finds its impetus in this Court's decision in *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976), concerning the legality under Title VII of an employer's disability benefit plan that excluded disabilities arising from pregnancy. Relying on *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), which rejected an attack on a similar program on constitutional grounds, the Court in *Gilbert* held that the G.E. plan did not violate Title VII. "Since it is a finding of sex-based discrimination that must trigger * * * the finding of an unlawful employment practice

under § 703(a)(1)," the Court held that "*Geduldig* is precisely on point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all" (429 U.S. at 136).

"[E]xpressing its disapproval of both the holding and reasoning of the Court in the *Gilbert* decision,"[2] Congress enacted the PDA, which amended Section 701 of Title VII. Without doubt, the primary purpose of the PDA was to eliminate employment practices that discriminated *against* pregnant female employees, particularly on the basis of the availability of disability leave or the employment consequences of taking such leave.[3] To that end, however, Congress chose to work within the existing nondiscrimination framework of Title VII and to subject pregnancy-based distinctions "to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute." H.R. Rep. 95-948, *supra,* at 4; S. Rep. 95-331, 95th Cong., 1st Sess. 4 (1977); see also *Arizona Governing Committee* v. *Norris,* 463 U.S. 1073, 1085 n.14 (1983).

---

[2] *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 (1983); see generally H.R. Rep. 95-948, 95th Cong., 1st Sess. 8 (1977) ("the bill is merely reestablishing the law as it was understood prior to *Gilbert*"); S. Rep. 95-331, 95th Cong., 1st Sess. 8 (1977) (same); 123 Cong. Rec. 29387, 29655 (1977) (remarks of Sen. Javits); 124 Cong. Rec. 21436 (1978) (remarks of Rep. Sarasin).

[3] See, *e.g.*, H.R. Rep. 95-948, 95th Cong., 1st Sess. 6 (1977) ("other employment policies which adversely affect pregnant workers are also covered"); 123 Cong. Rec. 29654 (1977) (remarks of Sen. Javits) ("We do not want pregnancy discriminated against * * *."); 124 Cong. Rec. 21435 (1978) (remarks of Rep. Hawkins) (pregnancy will no longer be "the basis of unfavorable treatment of working women"); *id.* at 36819 (remarks of Sen. Stafford) (bill will end "major source of discrimination unjustly afflicting working women"); *id.* at 36817 (remarks of Sen. Williams) ("this legislation will prohibit * * * employment policies which adversely affect pregnant workers").

The first clause of the new subsection (k) equates "pregnancy-based discrimination" with sex-based discrimination. The clause provides that Title VII's prohibition of discrimination "because of sex" or "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" (42 U.S.C. 2000e(k)). The second clause "explains the application of the general [nondiscrimination] principle to women employees" (*Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. at 678 n.14). Specifically, the second clause announces that nondiscrimination requires *equal treatment* of male and female employees (42 U.S.C. 2000e(k) (emphasis added)):

> [W]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same for all employment-related purposes,* including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work * * *.

The plain language of the PDA, amending Title VII, therefore, declares unequivocally that the nondiscrimination mandate of Title VII bars *any* difference in treatment, for *any* employment-related purpose, on grounds of pregnancy.[4] This language "must be construed to mean exactly what it says." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980). The touchstone of compliance with Title VII in the pregnancy context—and, accordingly, the standard that the California pregnancy disability law must meet to avoid preemption—is equal treatment of male and female employees.

[4] "Equal treatment" does not, however, mean that an employer may not make distinctions between different types of disabilities, including pregnancy, so long as any such distinctions are based *solely* on the employee's "ability or inability to work" and not on non-health related grounds favoring or disfavoring any specific disability. See H.R. Rep. 95-948, *supra*, at 5; 123 Cong. Rec. 29652, 29653 (remarks of Sen. Williams); *id.* at 29653-29654 (remarks of Sen. Javits).

2. Although "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute" (*Harrison* v. *PPG Industries, Inc.*, 446 U.S. at 592), here the legislative history of the PDA is fully consistent with the sweeping mandate of equal treatment announced by the broad language Congress employed. The House Report (H.R. Rep. 95-948, *supra*, at 4) for example, emphasized that the legislation would require equal rather than preferential treatment of pregnant employees:

> This legislation would clearly establish that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes a prohibition against employment-related discrimination on the basis of pregnancy, childbirth, or related medical conditions. * * *
>
> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. [The PDA] in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

See also *id.* at 3, 5, 6. The Senate Report reflects the same intent (S. Rep. 95-331, *supra*, at 4):

> [T]he bill, because it would operate as part of title VII, prohibits only discriminatory treatment. Therefore, the bill does not require employers to treat preg-

> nant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

So too, "[p]roponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers" (*Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. at 681 (emphasis in original; footnote omitted)).[5] Most telling is the theme echoed by both the House and Senate Reports and, remarkably, by practically every legislator who rose to speak to the bill's merits: the PDA does not require employers to provide disability leave or any type of disability benefit to pregnant employees in the first instance; rather, the law merely requires nondiscriminatory treatment of pregnant female employees by those employers who provide disability leave or benefits to their employees generally.[6] Indeed, a

[5] See, *e.g.*, 123 Cong. Rec. 7539 (1977) (remarks of Sen. Williams) ("there cannot be a place for unequal treatment of men and women"); *id.* at 10582 (remarks of Rep. Hawkins) ("must treat pregnant women as they treat other employees"); *id.* at 29385 (remarks of Sen. Williams) ("central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work"); *ibid.* ("key to compliance in every case will be equality of treatment"); *id.* at 29388 (remarks of Sen. Kennedy) ("merely requires that employers who have disability plans for their employees treat pregnancy-related disabilities in the same fashion that all other temporary disabilities are treated").

[6] H.R. Rep. 95-948, *supra*, at 4; S. Rep. 95-331, *supra*, at 4; 123 Cong. Rec. 7541 (1977) (remarks of Sen. Brooke) ("the bill being introduced would not mandate compulsory disability coverage"); *id.* at 8145 (remarks of Sen. Bayh) ("Under the provisions of our legislation, only those companies which already voluntarily offer disability coverage would be affected."); *id.* at 10582 (remarks of Rep. Hawkins) ("Thus an employer who does not now provide disability benefits to his employees will not have to provide such benefits to women."); *id.* at 29386 (remarks of Sen. Williams) ("this legislation does not require that any employer begin to provide health insurance where it is not presently provided"); *id.* at 29388 (remarks of Sen. Kennedy) ("This amendment does not require all employers to provide disability insurance plans; it merely requires that employers who have disability plans * * * treat pregnancy-related disabilities in the same fashion [as others]."); *id.* at 29663 (remarks of Sen. Cranston) ("since the basic standard is comparability among employees, an employer who does not provide medical benefits at all, would not have to pay the medical costs of pregnancy or child birth"); *ibid.* (remarks of Sen. Culver) ("The legislation before us today does not mandate compulsory disability coverage."); *ibid.* (remarks of Sen. Mathias) ("[the bill] does not, however, require that an employer do anything more for his pregnant employees than he does for any other employees").

different view—based on an entitlement to preferential treatment—would be inconsistent with the nondiscrimination mandate of Title VII, within which the PDA operates. As described by Senator Brooke during the debates: "I would emphasize most strongly that [the bill] in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men" (123 Cong. Rec. 29664 (1977)).

3. Finally, administrative construction of the PDA underscores the equal treatment mandate expressed in the statute's plain terms and manifested throughout the relevant legislative history. The guidelines of the Equal Employment Opportunity Commission (EEOC) are based on the premise that "[d]isabilities caused or contributed to by pregnancy, childbirth, or related medical conditions * * * shall be treated the same as disabilities caused or contributed to by other medical conditions" (29 C.F.R.

1604.10(b)). In addition, a Commission response to one in a series of formal self-directed questions posed in an effort to describe the import of the PDA is especially relevant to the instant case (29 C.F.R. Pt. 1604 App.). The response emphasizes that the employer's obligation to reinstate a pregnant employee to her same job is defined by, and is no greater than, the employer's policy towards employees on disability leave for other medical reasons (Q&A No. 9).

C. THE CALIFORNIA PREGNANCY DISABILITY LAW DISCRIMINATES ON THE BASIS OF SEX WITHIN THE MEANING OF THE TITLE VII, AS AMENDED BY THE PDA, BECAUSE IT REQUIRES AN EMPLOYER TO PROVIDE DISABILITY LEAVE AND CERTAIN REINSTATEMENT RIGHTS TO PREGNANT FEMALE EMPLOYEES, REGARDLESS OF THE EMPLOYER'S POLICY TOWARDS OTHER DISABLED EMPLOYEES

1. In sharp contrast to the federal statutory scheme, the California pregnancy disability law challenged by petitioners systematically selects out employees suffering pregnancy-related disabilities for certain guaranteed employment-related benefits. First, the statute requires all employers, including those not offering any disability leave to other disabled employees, to allow female employees affected by a pregnancy-related disability "[t]o take a leave on account of pregnancy for a reasonable period of time" (Cal. Gov't Code § 12945(b)(2)). Second, regardless of the availability of leave for other disabilities, the California statute defines "reasonable period of time" as meaning that period of time during which the female employee is disabled on account of pregnancy, up to four months (*ibid.*). Finally, respondents have construed the California law as requiring that employers provide certain reinstatement rights to female employees disabled on account of pregnancy, totally apart from the rights that employees disabled for other medical reasons might have

(Pet. App. E16). Specifically, the pregnant female employee is entitled to reinstatement to her same job, unless the employer can establish that the position is no longer available due to business necessity, which requires overcoming a presumption that the job could have either been left open or only temporarily filled during the leave period (*ibid.*). And even if the employer satisfies the "business necessity" standard, the employer is further obliged to "make a reasonable, good faith effort to return the employee to a substantially similar job" (*ibid.*). Each of these reinstatement rights applies regardless of the availability of any such rights for other disabled employees.

We are not unsympathetic to the laudable goals of the California pregnancy disability law: protection of maternal and infant health. Indeed, we would agree that these goals are largely shared by the PDA. As explained at the outset (see page 10, *supra*), however, preemption analysis does not turn on mere surface consistency between the general purposes underlying the state and federal statutory schemes. Instead, where, as here, the statutory mechanisms of the two schemes irreconcilably conflict because Congress has decided that the goal of nondiscrimination is preeminent, the conclusion that the state law must bow under the Supremacy Clause cannot be resisted. See *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing & Bargaining Bd.*, slip op. 15.

Simply put, a state requirement that an employer must grant benefits to pregnant female employees that it need not provide to other employees violates the requirement imposed by Title VII, as amended by the PDA, that pregnant female employees "be treated the same" as other persons not so affected "for all employment-related purposes" (42 U.S.C. 2000e(k)). Because the PDA equates pregnancy-based discrimination with gender discrimina-

tion, California's policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978), quoting *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971); see also *Arizona Governing Committee* v. *Norris*, 463 U.S. at 1080 (Title VII "prohibits an employer from treating some employees less favorably than others because of their * * * sex"). Accordingly, both the general preemption provision of the Civil Rights Act and the specific preemption provision in Title VII support preemption in this case. The California law is clearly "inconsistent with" the equal treatment mandate of Title VII (42 U.S.C. 2000h-4) and "require[s] or permit[s] the doing of an[ ] act which would be an unlawful employment practice under" Title VII (42 U.S.C. 2000e-7).

Admittedly, Congress does not appear to have directly considered every potential ramification of the PDA, including the question of prohibiting "advantaging" discrimination, such as the California law. We freely acknowledge that substantial policy justifications could support a legislative decision to permit or even encourage employment practices that classify on the basis of pregnancy for the purpose of providing pregnant female employees with guaranteed (or preferential) treatment.[7] These concerns, however, are "best addressed [by] Congress" (*Maine* v. *Thiboutot*, 448 U.S. 1, 8 (1980)) and do

[7] This case does not present the constitutional issue whether a state or federal law singling out pregnant female employees for guaranteed or preferential benefits would violate equal protection, no doubt because the argument is foreclosed by this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). It cannot be contended that the State lacks a rational basis for according pregnant female employees special protection. See *Harris* v. *McRae*, 448 U.S. 297, 325 (1980)

not affect the preemption issue now before the Court. For present purposes, it is sufficient that Congress deliberately chose to pursue the objectives of the PDA within the structure of Title VII and in so doing unequivocally announced a general principle outlawing *any* difference in treatment, for *any* employment-related purpose, on grounds of pregnancy. Congress has, in effect, declared that the societal interest in nondiscrimination overrides other competing societal interests in the pregnancy context. Absent some clear indication in the legislative history to the contrary, the equal treatment principle must be strictly applied and the California pregnancy disability law preempted.

2. a. None of the various contentions presented by respondents or relied on by the court of appeals justifies a departure from Title VII's sweeping mandate in this case. First, contrary to the reasoning of the court of appeals (Pet. App. A5), there is no basis for reading into Title VII any acquiescence in discrimination against male employees. This Court's Title VII decisions in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee* v. *Norris, supra*, overturning employer benefit programs for failing to treat female and male employees equally, did not depend on the fact that the gender being discriminated against in those cases happened to be female. "Th[e] underlying assumption [of both decisions was] * * * that Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual, or national class'" (*Norris*, 463 U.S. at 1083 (emphasis in original), quoting *Manhart*, 435 U.S. at 708; see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, supra*, 84 Harv. L. Rev. at 1174). There is no reason to suppose that the Court would have decided *Manhart* or *Norris* any differently had the roles been reversed and had generalizations about the longevity of men been used to disadvantage male employees.

Similarly, "there is no reason to believe that Congress intended a special definition of discrimination in the context of" pregnancy, barring only discrimination against female employees. Cf. *Manhart,* 435 U.S. at 710. The PDA "did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female—which was already present in the Act" (*Newport News*, 462 U.S. at 675-676 n.11). Congress intended the PDA to "protect[] *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers" (*id.* at 681 (emphasis in original; footnote omitted)). Such an understanding of the PDA's broad mandate was central to this Court's holding in *Newport News* that an employment classification based on pregnancy "violate[d] Title VII by discriminating *against male employees*" (462 U.S. at 685 (emphasis added; footnote omitted)).

To be sure, the pregnancy classification in *Newport News* (while discriminating against males) operated "to treat pregnancy-related conditions less favorably than other medical conditions" (462 U.S. at 684). And, as we noted above, "congressional discussion [surrounding the PDA's enactment] focused on" classifications treating pregnancy-related disabilities unfavorably (*id.* at 679; see note 3, *supra*). As this Court noted in *Newport News*, however, these factors do not "create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment" (*ibid.* (citations omitted))—discrimination against pregnant employees. This is particularly true because Congress has not hesitated to create express exceptions from Title VII's nondiscrimination principle to accommodate competing societal values. See, *e.g.*, 42 U.S.C. 2000e(j) (accommodation of employee's religious beliefs); 42 U.S.C. 2000e-2(i) (preferential treatment of Indians). Here, by contrast, there is not merely congressional silence on the question, but a resounding congressional mandate,

expressed in the PDA's plain language and echoed throughout the legislative history, that the PDA would operate *within* the nondiscrimination principle of Title VII, with no exceptions for employment practices that discriminated in favor of pregnant employees.[8]

b. Respondents also argue (Br. in Opp. 10-14, 17-19) that the California pregnancy disability law can somehow be reconciled with the PDA's equal treatment mandate based on decisions of this Court holding that facially equal treatment may violate Title VII due to its "disparate impact" on the two sexes. See, *e.g., Nashville Gas Co.* v. *Satty,* 434 U.S. 136, 141 (1977); *International Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 336 n.15 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Specifically, respondents assert that selective guaranteed disability leave and reinstatement rights for pregnant female employees are justified because "a facially neutral employment policy under which unduly restrictive, insufficient or no leave is available will have an adverse impact

[8] Contrary to respondents' contention (Br. in Opp. 7), the references in the legislative history to "[state] laws which specifically refer to pregnancy" (S. Rep. 95-331, *supra*, at 3; H.R. Rep. 95-948, *supra*, at 10-11) do not suggest congressional endorsement of those laws. The House Report (at 11), for example, describes the significance of these existing laws quite narrowly, without hinting at any approval of their terms. Instead, the significance of the laws was explicitly confined to the mere fact of their existence, particularly how their existence suggested that a federal bill would have "little or no economic impact on [ ] employers" covered by preexisting laws, and how their differing terms meant that "employers who operate in several States face different requirements" (*ibid.*). The lack of careful congressional consideration, let alone endorsement of the terms of these state laws, is highlighted by the responses of Senators Williams and Javits to inquiries concerning the merits of a New Jersey law, included in those listed, that guaranteed disability leave for pregnancy, but also imposed a ceiling on the amount of leave required. Each Senator intimated that the law would be preempted by the PDA. See 123 Cong. Rec. 29654 (1977) (remarks of Sen. Williams); *ibid.* (remarks of Sen. Javits).

on women affected by pregnancy, childbirth or related medical conditions" (Pet. App. E17). This claim misapprehends the narrow role of disparate impact analysis in Title VII litigation.

Disparate impact analysis looks to a *particular* employer's policy, including the specific effects of a facially-neutral practice on complaining employees. Contrary to respondents' contention, the possibility of a finding of disparate impact in isolated circumstances cannot justify a blanket requirement that *all* employers provide employees of one gender with certain guaranteed disability leave and reinstatement rights in *all* instances. Moreover, the California legislature's desire to achieve group results for pregnant female employees cannot justify disparate treatment of individual employees with other disabilities.[9] As this case reveals,[10] the unfocused application of such a remedial scheme ultimately serves to perpetuate widespread sex-based discrimination, not to eliminate it. Cf. *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. at 708 ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."); see also *Connecticut* v. *Teal*, 457 U.S. 440, 453-456 (1982) (selection procedure's ultimate proportionate impact on a group

[9] This Court has applied similar principles in the equal protection context, holding that assumptions about the special needs of members of a gender cannot jusify discrimination against members of the other gender. See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 281-283 (1979).

[10] There has been no showing in this case that petitioners' facially neutral plans create any disparate impacts actionable under Title VII. The court of appeals expressly declined to rely on any disparate impact that the employer's policy might have on pregnant female employees (Pet. App. A6-A7).

does not justify discrimination against an individual member of the group).[11]

More fundamentally, respondents' reliance on this Court's disparate impact precedent suggests that respondents misunderstand the nature of the PDA's equal treatment requirement. A primary purpose of the PDA was to eliminate the need for employees to rely on disparate impact analysis to support their Title VII claims based on pregnancy classifications "[b]y making clear that distinctions based on pregnancy are *per se* violations of Title VII" (H.R. Rep. 95-948, *supra*, at 3). Indeed, Congress appears to have intended that disparate impact

[11] For analogous reasons, Congress rejected (by lack of a sufficient second) an amendment to the PDA that would have established a general nationwide ceiling on the amount of disability leave an employer would have to provide to pregnant female employees. See 123 Cong. Rec. 29650-29656 (1977). Legislators who rose to speak against the measure emphasized the inappropriateness of singling out pregnancy for special treatment and the inherent discriminatory nature of doing so. See, *e.g.*, *id.* at 29652-29653 (remarks of Sen. Williams) ("Any kind of arbitrary classification, such as that which would be established by this amendment, has no place in this legislation. * * * * * [P]regnancy c[an] not be singled out for this type of requirement. * * * * * The amendment * * * is * * * discriminatory in its purpose and thrust * * *. * * * * * [W]e cannot, in dealing with [pregnancy] discrimination, create our own here on the floor."); *id.* at 29653 (remarks of Sen. Javits) ("I think we are faced with a situation where we are asked to instill discrimination in a bill which seeks to eliminate discrimination."); *id.* at 29655 (remarks of Sen. Javits) ("If we are going to do that, why should we not set a schedule for tonsils, appendectomy, strep throat * * *. * * * * * Our point is that the employer has the problem of demonstrated comparability and good faith. What the [amendment] wishes us to do is substitute us for individual employers who are subject to that test, on a particular item—to wit, pregnancy. I cannot see that."). Of course, the California law, by singling out pregnancy disability for certain treatment, offends these same concerns. And, as discussed previously (see pages 19-21, *supra*), the discriminatory nature of such an approach does not depend on whether the classification favors or prejudices pregnant female employees.

analysis would not play a meaningful role in the pregnancy context after passage of the PDA. As discussed above (page 14, *supra*), the legislators uniformly agreed that the PDA would not require any employer to offer leave or disability benefits, and to that extent appear to have shared the Court's view in *Gilbert* "that an employer who has no disability benefits program at all does not violate Title VII" (429 U.S. at 139-140). Hence, Congress expressly endorsed the notion that a facially neutral no-leave policy would not violate Title VII, regardless of its disparate impact on pregnant female employees. It would certainly be somewhat anomalous to assume, therefore, that Congress contemplated subjecting a facially neutral policy that provided disability benefits to disparate impact analysis. Instead, it seems more likely that Congress intended to approve of all facially neutral employer disability policies.[12]

At all events, even assuming any remaining role for disparate impact analysis in reviewing pregnancy-based classifications under Title VII, it provides no justification

[12] The EEOC guidelines provide contradictory answers to this question. On the one hand, the guidelines retain a provision promulgated *before* the enactment of the PDA suggesting that a facially neutral employer policy of providing no leave or insufficient leave violates Title VII "if it has a disparate impact on employees of one sex and is not justified by business necessity." 29 C.F.R. 1604.10(c). See 44 Fed. Reg. 13278 (1979); 37 Fed. Reg. 6836, 6837 (1972). On the other hand, EEOC responses to several self-directed questions drafted *after* passage of the PDA stress that the employer's Title VII obligation in the pregnancy context extends no further than the employer's policy towards other disabilities. See 29 C.F.R. Pt. 1604 App. (Q&A No. 9) ("her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons"); Q & A No. 15 ("[if] some other limitation [on benefits] is set for all other temporary disabilities, * * * pregnancy-related disabilities should be treated the same"). We believe the better view is that the PDA's equal treatment mandate announced the overriding principle for Title VII compliance in the pregnancy context.

for the state law challenged here. The California statute does not assess the impact of any specific employer's plan on the treatment of male and female employees, but rather promotes unequal treatment by dictating the substantive content of all employer plans on behalf of one gender. That requirement cannot coexist with the nondiscrimination mandate of Title VII, as amended by the PDA.

D. PREEMPTION MAY NOT BE AVOIDED BY CONSTRUING EITHER THE CALIFORNIA LAW OR TITLE VII TO REQUIRE THAT EMPLOYERS PROVIDE EQUAL DISABILITY LEAVE OR REINSTATEMENT RIGHTS TO NON-PREGNANT EMPLOYEES

The clear conflict between the California pregnancy disability law and Title VII may not be eliminated by construing the state law to require employers to extend benefits mandated for pregnant women to all members of the workforce or by assuming that employers must do so in order to avoid a violation of Title VII. Although an "expansive" construction of state law would eliminate any conflict between the federal and state statutory programs, the federal judiciary is not so free to rewrite state law in order to avoid conflicts with federal law, particularly where, as here, the extension would require a dramatic increase in the scope of the state law. California singled out a small proportion of the workforce—pregnant female employees—for guaranteed disability leave and reinstatement rights. Extension of these benefits to the entire workforce would involve a several-fold increase in cost. If California's family protective purposes are to be served by such a radically more expansive scheme, the courts or legislature of California must make that initial judgment. See *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 152-153 (1980) ("[b]ecause state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation").

So too, preemption cannot be avoided merely by requiring employers in California to extend comparable disability benefits and reinstatement rights as a matter of federal law (Title VII). Whatever the merits of such a preemption end-run in other circumstances (which we question), the PDA cannot fairly be read as imposing that obligation on employers. In enacting the PDA, Congress repeatedly, indeed emphatically, stated that the law would not interfere with an employer's freedom to decide whether to offer disability leave or other benefits to employees (see page 14, *supra*).[13] In the face of such overwhelming expressions of congressional intent, we cannot suppose that Congress intended the PDA to work in tandem with state laws to produce the precise effect that Congress stated the PDA would not have: forcing an employer who did not provide disability benefits to provide them. Title VII neither tolerates nor cooperates with state-sanctioned discrimination, whether based on sex, race, color, or national origin. The California pregnancy disability law cannot, therefore, look to Title VII's nondiscrimination mandate to justify discrimination that Title VII so plainly condemns.

[13] Similarly, in successfully resisting an amendment to the PDA that would have established a ceiling on pregnancy leave, supporters of the PDA stressed the need to allow employers to decide, in the first instance, how much leave to provide employees. See note 11, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

MICHAEL A. CARVIN
Deputy Assistant Attorney General

RICHARD J. LAZARUS
Assistant to the Solicitor General

BRIAN K. LANDSBERG
DAVID K. FLYNN
MARY E. MANN
Attorneys

APRIL 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, MERCHANTS AND MANUFACTURERS ASSOCIATION, and CALIFORNIA CHAMBER OF COMMERCE,
Petitioners,

v.

MARK GUERRA, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, CRUZ F. SANDOVAL, and FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

ROBIN S. CONRAD
Counsel of Record
PAULA J. CONNELLY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae Chamber of Commerce of the United States

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a state statute which mandates preferential treatment of pregnant employees should be declared null and void because it conflicts with Title VII, as amended by the Pregnancy Discrimination Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE NINTH CIRCUIT ERRED IN HOLDING THAT TITLE VII CONSTRUCTS A FLOOR AND NOT A CEILING FOR PREGNANCY BENEFITS	5
A. The Ninth Circuit Ignored the Plain Meaning and the Legislative History of Title VII..	6
B. The Ninth Circuit Misconstrued this Court's Holding in *Newport News*	11
II. STATE STATUTES MANDATING PREFERENTIAL TREATMENT OF PREGNANT EMPLOYEES CONFLICT WITH TITLE VII AND ARE INVALID UNDER THE SUPREMACY CLAUSE	12
A. Preferential State Statutes Conflict With Title VII's Mandate of Equal Treatment	13
B. Preferential State Statutes Do Not Protect Employees from Disparate Impact Discrimination, Because Disparate Impact Must Be Proved and There Is No Evidence That Women Are More Adversely Affected by Disability Than Men Are	15
C. Preferential State Statutes Undermine the Objectives of Federal Law	16

TABLE OF CONTENTS—Continued

	Page
III. NULLIFICATION OF PREFERENTIAL STATE STATUTES IS THE ONLY APPROPRIATE REMEDY	19
A. Substantial Changes in Legislative Intent Must Be Made By Legislatures, Not Courts	19
B. Extension of Benefits By this Court Would Usurp the Powers of the State	22
C. Nothing Prevents This Court From Invalidating Preferential State Statutes	22
CONCLUSION	24

TABLE OF AUTHORITIES

CASES

	Page
Abraham v. *Graphic Arts International Union*, 660 F.2d 811 (D.C. Cir. 1981)	15
Arp v. *Workers' Compensation Appeals Board*, 563 P.2d 849 (Cal. 1977)	20
Bastardo v. *Warren*, 4 Empl. Prac. Dec. (CCH) ¶ 7635 (W.D. Wis. 1970)	21
Bread Political Action Committee v. *Federal Election Comm'n*, 455 U.S. 577 (1982)	7
Burns v. *Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal. 1972)	22
Califano v. *Westcott*, 443 U.S. 76 (1979)	20
California Federal Savings and Loan Ass'n v. *Guerra*, 758 F.2d 390 (9th Cir. 1985)	*passim*
California Federal Savings and Loan Ass'n v. *Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984)	3
Cobb v. *United States Merchant Marine Academy*, 592 F. Supp. 640 (E.D.N.Y. 1984)	17
Community & Economic Development Ass'n of Cook County v. *Suburban Cook County Area Agency on Aging*, 770 F.2d 662 (7th Cir. 1985)	20
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980)	7
Daly v. *Three Village Central School District*, 109 A.D.2d 772, 486 N.Y.S.2d 286 (1985)	15
Day v. *W.A. Foote Memorial Hospital, Inc.*, 316 N.W.2d 712 (Mich. 1982)	21
Delta Air Lines, Inc. v. *Kramarsky*, 650 F.2d 1287 (2d Cir. 1981), *aff'd in part, vacated in part sub nom. Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983)	20
Doctors Hospital, Inc. v. *Recio*, 383 F. Supp. 409 (D.P.R. 1974)	20, 22
Eblin v. *Whirlpool Corp.*, 36 Fair Empl. Prac. Cas. (BNA) 1532 (N.D. Ohio 1985)	17
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963)	14
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976)	6

TABLE OF AUTHORITIES—Continued

	Page
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 (1980)	7
Heckler v. *Mathews*, 465 U.S. 728 (1984)	23
Hines v. *Davidowitz*, 312 U.S. 52 (1941)	15
Homemakers, Inc. v. *Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976)	22
Homemakers, Inc. v. *Division of Industrial Welfare*, 356 F. Supp. 1111 (N.D. Cal. 1973), *aff'd*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976)	19
Industrial Welfare Comm'n v. *Superior Court of Kern County*, 613 P.2d 579 (Cal.), *cert. denied*, 449 U.S. 1034 (1980)	19
Jet Industries, Inc. v. *United States*, 603 F. Supp. 643 (W.D. Tex. 1984), *aff'd*, 777 F.2d 303 (5th Cir. 1985)	22
Joseph Skilken & Co. v. *City of Toledo*, 528 F.2d 867 (6th Cir. 1975), *vacated*, 429 U.S. 1068, *aff'd on remand*, 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977)	22
Mason v. *Continental Insurance Co.*, 32 Fair Empl. Prac. Cas. (BNA) 578 (N.D. Ala. 1983)	17
Miller-Wohl Co., Inc. v. *Commissioner of Labor & Industry, State of Montana, juris. statement filed*, 53 U.S.L.W. 3718 (U.S. Mar. 27, 1985) (No. 85-1545)	2, 13
Newport News Shipbuilding and Dry Dock Co. v. *EEOC*, 462 U.S. 669 (1983)	11, 12
Rosenfeld v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971)	19
Shaw v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983)	13
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984)	13
Sloan v. *Lemon*, 413 U.S. 825 (1973)	20
State v. *Fairfield Communities Land Co.*, 538 S.W.2d 698 (Ark.), *cert. denied*, 429 U.S. 1004 (1976)	21

TABLE OF AUTHORITIES—Continued

	Page
Transcontinental Gas Pipe Line Corp. v. *State Oil and Gas Board of Mississippi*, 88 L.Ed.2d 732 (1986)	12
United States v. *Rodgers*, 466 U.S. 475 (1984)	20
Vick v. *Pioneer Oil Co.*, 569 S.W.2d 631 (Tex. Civ. App. 1978)	21
Vuyanich v. *Republic National Bank of Dallas*, 505 F. Supp. 224 (N.D. Tex. 1980), *vacated and remanded*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 105 S. Ct. 567 (1984)	17
Welsh v. *United States*, 398 U.S. 333 (1970)	21
Wetzel v. *Liberty Mutual Insurance Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1976)	16
CONSTITUTION	
U.S. Const. art. VI, § 2	3, 10
Cal. Const. art. XIV, § 1	19
Cal. Const. art. XX, § 17½	19
STATUTES	
Federal	
Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*	*passim*
42 U.S.C. § 2000e-7	3, 12, 13
42 U.S.C. § 2000h-4	12, 13
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1984))	*passim*
42 U.S.C.A. § 2000e(k) note	23
State	
California Fair Employment and Housing Act, Cal. Gov't Code § 12945(b)(2)	*passim*
Cal. Stats. 1972, ch. 1122, §§ 2-6	19
Cal. Stats. 1973, ch. 1007, §§ 1.5-4	19

TABLE OF AUTHORITIES—Continued

	Page
Conn. Gen. Stat. Ann. § 46a-60(a) (7) (West Supp. 1985)	13
Laws of Puerto Rico Ann., ch. 19, title 29 §§ 467, 468 (Equity 1985)	14
Mass. Gen. Laws Ann., ch. 149 § 105D (West Supp. 1985)	13
Montana Maternity Leave Act, Mont. Code Ann. § 49-2-310	13
LEGISLATIVE MATERIALS	
Committee Print of the Legislative History of the Pregnancy Discrimination Act prepared for the Senate Committee on Labor and Human Resources (June 1980)	
Leg. Hist. at 25	8
Leg. Hist. at 41	7, 9
Leg. Hist. at 64	8, 23
Leg. Hist. at 67	16
Leg. Hist. at 75	9
Leg. Hist. at 90	11
Leg. Hist. at 125	9
Leg. Hist. at 135	9
Leg. Hist. at 150	8
Leg. Hist. at 156	10
Leg. Hist. at 157	11
H.R. Rep. No. 948, 95th Cong., 2d Sess. 4 (1978)	8
S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977)	7
ADMINISTRATIVE MATERIALS	
EEOC Compliance Manual § 626.4, *reprinted in* EEOC Compliance Manual (BNA) at p. 626: 0007	18
EEOC Compliance Manual § 626.5, *reprinted in* EEOC Compliance Manual (BNA) at p. 626: 0009	15
EEOC Dec. No. 75-256, 11 Fair Empl. Prac. Dec. (BNA) 990 (1975)	18

TABLE OF AUTHORITIES—Continued

	Page
EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604	18
44 Fed. Reg. 23,804 (1979)	18
37 Fed. Reg. 6,836 (1972)	18
In the matter of the Accusation of the California Department of Fair Employment and Housing v. *Travel Express*, Case No. FEP 80-81 A7-0992s (Aug. 4, 1983)	5
New Hampshire Code of Admin. Rules Ann., Human Rights Commission Rules on Practice and Procedure, HUM 402.03 (Equity 1985)	13
Washington Admin. Code, Human Rights Commission Admin. Rules, WAC 162-30-020(5) (1984)	13
MISCELLANEOUS MATERIALS	
Beers, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum. J.L. & Soc. Prob. 115 (1975)	21
Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301 (1979)	20
Krieger and Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U.L. Rev. 513 (1983)	17
Little, *Mother Load or Overload: The Need for a National Maternity Policy*, 17 N.Y.U.J. Int'l L. & Pol. 717 (1985)	17
Note, *Equality in the Workplace: Is that Enough for Pregnant Workers?*, 23 J. Fam. L. 401 (1985)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-494

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, MERCHANTS AND MANUFACTURERS ASSOCIATION, and CALIFORNIA CHAMBER OF COMMERCE,
Petitioners,

v.

MARK GUERRA, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, CRUZ F. SANDOVAL, and FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST

With the written consent of all parties,[1] the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the Petitioners. The Chamber is the nation's largest federation of businesses, representing more than 180,000 companies, as well as several thousand trade and professional

---

[1] The consent letters have been filed with the Clerk of the Court.

associations, and state and local chambers of commerce. A substantial portion of the Chamber's membership consists of employers covered under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1984) ("PDA").[2] More than 13,000 Chamber members are located in California and are therefore also subject to the state pregnancy leave statute at issue in this case. As a result of the Ninth Circuit's decision below, many of these employers are currently in violation of either California or federal law. It is impossible for them to comply with both without violating the express intent of Congress in enacting the PDA.

As interpreted and enforced by the State, section 12945(b)(2) of the California Fair Employment and Housing Act requires employers to provide workers disabled by pregnancy with up to four months of unpaid leave and reinstatement, but does not entitle other disabled employees to the same benefits. Title VII, on the other hand, requires employers to treat pregnant employees *the same* as all other employees, based on their ability or inability to work. The question before this Court is whether the Supremacy Clause prohibits states from requiring special treatment of pregnant employees when federal law mandates equal treatment.

California is not the only state that mandates preferential treatment of pregnant employees. Numerous other states currently require some form of special benefits, in varying scope and degree.

The Chamber has participated in several cases concerning the scope of the PDA,[3] and is well-suited to present

---

[2] Title VII applies to employers of 15 or more persons engaged in an industry affecting commerce.

[3] *Miller-Wohl Co., Inc.* v. *Commissioner of Labor and Industry, State of Montana, juris. statement filed,* 53 U.S.L.W. 3718 (U.S. Mar. 27, 1985) (No. 84-1545), Motion for Leave to File Brief

the business perspective on this important employment issue. Preferential state laws conflict with the federal goal of equal opportunity, and put employers in the untenable position of violating Title VII when attempting to comply with local statutes. This dilemma is particularly onerous for multistate employers, especially when different states require different kinds of preferential treatment. The Chamber believes that this Court should resolve the legal and practical problems these statutes cause employers by reversing the Ninth Circuit, and declaring § 12945(b)(2) of the California Code null and void.

STATEMENT OF THE CASE

This federal preemption case arises out of a lawsuit filed by the California Federal Savings and Loan Association ("Cal Fed" or "Petitioner") against the State of California on the grounds that § 12945(b)(2) of the California Code mandates preferential treatment of pregnant employees in violation of Title VII, the Pregnancy Discrimination Act which amended Title VII in 1978, and the Supremacy Clause of the United States Constitution. 42 U.S.C. §§ 2000e-2, 2000e(k); 2000e-7; U.S. Const. art. VI § 2. Granting summary judgment for Cal Fed, the U.S. District Court for the Central District of California held that Title VII preempts the California law, and declared it "null, void, invalid and inoperative under the Supremacy Clause."[4] The U.S.

Amicus Curiae *granted,* 54 U.S.L.W. 3459 (U.S. Jan. 13, 1986) (same issue as in this case); *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC,* 462 U.S. 669 (1983) (this Court's only interpretation of the PDA); *Kansas Ass'n of Commerce and Industry* v. *EEOC,* 22 Fair Empl. Prac. Cas. (BNA) 1343 (D. Kan. 1980) (the first federal district court challenge of the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1981)) (filed by a Chamber affiliate).

[4] *California Federal Savings and Loan Ass'n* v. *Guerra,* 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. Mar. 21, 1984) (Real, J.), *reprinted* in Petition for Cert. E-1, at E-15.

Court of Appeals for the Ninth Circuit reversed, entered summary judgment for the defendants, and upheld the California law. Stating that Congress intended to "require employers to include pregnancy disability leave in their otherwise comprehensive benefit packages," the Ninth Circuit held that Title VII "construct[s] a floor beneath which pregnancy disability benefits may not drop —not a ceiling above which they may not rise." [5]

SUMMARY OF ARGUMENT

The Pregnancy Discrimination Act is an anti-discrimination statute and, contrary to the Ninth Circuit's decision, does not mandate specific benefits for pregnant employees. Rather, as the statute and its legislative history make clear, the PDA requires employers to provide employees disabled by pregnancy with the same benefits, for the same period, and on the same terms as provided to other disabled employees. Thus, the PDA functions as both a floor *and* a ceiling for pregnancy benefits.

The employment preferences mandated by the California law contravene the express purposes of the PDA and force employers to violate federal law by requiring special treatment of employees disabled by pregnancy. The inherent inconsistencies between the California statute and the PDA are compounded by the preferential treatment accorded pregnant employees in at least six other states. Federal preemption and nullification of conflicting state statutes is the only appropriate solution. Any suggestion that these conflicts can be eliminated by extending the state-mandated benefits to all disabled employees must be rejected as contrary to congressional intent and a federal incursion into powers vested exclusively in the state.

---

[5] *California Federal Savings and Loan Ass'n*, 758 F.2d 390, 396 (9th Cir. 1985), Petition for Cert. at A-10.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT TITLE VII CONSTRUCTS A FLOOR AND NOT A CEILING FOR PREGNANCY BENEFITS.

The California statute at issue here requires employers to grant a leave of absence to employees disabled by pregnancy for up to four months, and to reinstate them in the same or a similar job when the leave period expires.[6] These requirements apply regardless of the employer's existing policy on disability leave. Thus, California employers must grant leave and guarantee reinstatement to employees disabled by pregnancy even when company policy does not provide such benefits to other temporarily disabled employees. By providing pregnant employees with greater rights than are accorded other employees, the California statute flies in the face of the Pregnancy Discrimination Act and its legislative history. In upholding the California law as consistent with Title VII, the Ninth Circuit grievously misconstrued the explicit intent

---

[6] The California Fair Employment and Housing Act, Cal. Gov't Code § 12945, provides:

> It shall be an unfair employment practice unless based upon a bona fide occupational qualification: . . .
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . .
>
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth or related medical conditions.

The State interprets this section of the Code as requiring employers to guarantee job reinstatement. *In the matter of the Accusation of the Department of Fair Employment and Housing* v. *Travel Express*, Case No. FEP 80-81 A7-0992s (Aug. 4, 1983).

of Congress in amending Title VII to include the Pregnancy Discrimination Act.

A. The Ninth Circuit Ignored the Plain Meaning and the Legislative History of Title VII.

Congress enacted the Pregnancy Discrimination Act to ensure equal treatment of pregnant employees in the workplace by specifically overruling this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Court had ruled that employers who excluded pregnancy-related disabilities from an employee disability income plan did not discriminate on the basis of sex in violation of Title VII. In reversing *Gilbert*, Congress made it clear that an employee disabled by pregnancy is to be treated like any other disabled employee. Section 2000e(k) explicitly states that "women affected by pregnancy" shall be treated "*the same* for all employment-related purposes . . . *as other persons not so affected but similar in their ability or inability to work*" (emphasis added).[7] Clearly, this language does not support the Ninth Circuit's interpretation that Congress intended to "construct a floor beneath which pregnancy disability benefits may not drop."[8] Had Congress actually intended employers to provide pregnant employees with "at least the same" benefits as other employees, it would have said so. The Ninth Circuit decision does not square

[7] The Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)), provides:

> (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(b) of this title shall be interpreted to permit otherwise.

[8] 758 F.2d at 396, Petition for Cert. at A-10.

with the express language of the statute. As stated by this Court in *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980), "in the absence of legislative history to the contrary, [the language of the statute] must be construed to mean exactly what it says." *See also, Bread Political Action Committee* v. *Federal Election Commission*, 455 U.S. 577, 580-581 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In addition to the plain meaning of § 2000e(k), its legislative history is replete with expressions of congressional intent that pregnant employees receive equal, but not preferential treatment. The Senate Report on S. 995, the bill that ultimately became the PDA, states in the section entitled "Basic Principles" that:

> [T]he bill, because it would operate as part of title VII, prohibits only discriminatory treatment. Therefore, the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977) *reprinted in* Committee Print of the Legislative History of the PDA prepared for the Senate Committee on Labor and Human Resources (June 1980) (hereinafter "Leg. Hist.") at 41.

The House Report reflects the same intent:

> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnish-

> ing medical and hospital benefits, providing disability benefits, or any other matter. [The bill] in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

H.R. Rep. No. 948, 95th Cong., 2d Sess. 4 (1978); Leg. Hist. at 150. Of particular note are the words of Congressman Hawkins, the principal sponsor of the House bill:[9]

> Like title VII, generally, [the PDA] merely requires that employers not discriminate. Thus, an employer *who does not now* provide disability benefits to his employees *will not have to* provide such benefits to women disabled due to pregnancy or childbirth.

Leg. Hist. at 25 (emphasis added).

Other members of Congress were similarly emphatic about not requiring employers to create special benefits for pregnant employees. Senator Williams, Chairman of the Senate Human Resources Committee and a chief sponsor of S. 995, remarked in debate:

> [I]t is important to bear in mind that this legislation does not require that any employer begin to provide health insurance where it is not presently provided. Rather, it requires that employers who do provide health insurance do so on a non-discriminatory basis.

Leg. Hist. at 64 (emphasis added). His remarks were echoed by numerous other sponsors of the bill. *See, e.g.*, Remarks of Senator Brooke: "And I would emphasize most strongly that S. 995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same

[9] Congressman Hawkins introduced H.R. 5055 on March 15, 1977. It was reintroduced as H.R. 6075 on April 5, 1977. *See* Leg. Hist. at 150.

employment rights as men." Leg. Hist. at 135; Remarks of Senator Biden: "[T]here are a few myths surrounding the bill that I would like to dispel. First, the bill does not require employers to provide medical insurance or benefits for its employees. It simply requires that if coverage or benefits are given that disability due to pregnancy must be treated the same as other non-work-related disability. . . . [I]f the employer did not extend health benefits to male employees, he would not have to do so for female employees either." Leg. Hist. 125; Remarks of Senator Bayh: "What would the impact of this legislation be on our Nation's businesses? First, nothing under this legislation would require a company to offer either a health insurance or a disability insurance plan if it is not presently doing so. The legislation only affects those companies who voluntarily provide such coverage to their employees." Leg. Hist. at 75.

Nor does the Ninth Circuit's statement that Congress intended to "require employers to include pregnancy disability leave in their otherwise comprehensive benefit packages"[10] support its conclusion that Congress therefore intended the PDA to serve as a "floor beneath which pregnancy disability benefits may not drop."[11] It is undisputed that an employer providing disability benefits is required to provide the same benefits to workers disabled by pregnancy. But "[a]n employer who does not provide disability benefits or paid sick leave to other employees will not, because of S. 995, have to provide these benefits" to pregnant employees. Leg. Hist. at 41. Clearly, Congress intended only that employers provide pregnant employees with the same benefits already available to other employees.

The State tries to make much of the fact that Congress knew when it enacted the PDA that certain state

[10] 758 F.2d at 396, Petition for Cert. at A-10.

[11] *Id.*

laws covered pregnancy disability.[12] However, congressional awareness of the existence of these state laws does not constitute congressional approval of preferential treatment. The legislative history of the PDA simply does not support the State's claim. In fact, Senator Javits's remarks expressly refute any suggestion that the PDA mandates preferential treatment by noting that federal law "does not go that far." Nor does Congressman Sarasin's statement that "[t]he States have authority under the Constitution to go beyond requirements of Federal law in these matters, so long as their laws do not conflict with Federal law" support the State's argument that Congress approved of preferential state statutes. *See* Op. Cert. at 8. As demonstrated in Part II below, preferential state statutes do conflict with Title VII and are invalid under the Supremacy Clause.

Moreover, it is unclear from the legislative history that Congress was even *aware* that the existing state statutes mandated preferential treatment. The portion of the House Report cited by the State comes from a section entitled "State Treatment of Pregnancy." There, the House Report describes state pregnancy laws as taking two basic forms: "(1) a provision for coverage in some form under a State disability insurance law [or] (2) a requirement of equal treatment of pregnant workers under a State fair employment practices law." Leg. Hist. at 156. Illustrating the lack of economic impact of the PDA on many employers, the Report noted: "At least 22 States, including the most populous States, now mandate some form of pregnancy disability coverage through one of the mechanisms described above." Since this section

[12] *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Op. Cert.") at p. 7-8 (citing House Report finding that "six states, as well as the District of Columbia, specifically *include pregnancy* in their Fair Employment Practices laws. . . .", and statement of Senator Javits that "[a]lthough several State Legislatures . . . have chosen to address the problem by mandating certain types of benefits for pregnant employees, [the PDA] [§ 701k] *does not go that far*") (emphasis added).

focused on the *economic impact* of the PDA on employers *already* required by state law to provide *equal treatment* to employees disabled by pregnancy, its findings do not support the State's argument.

Thus, the Report concludes:

> The significance of this State coverage for H.R. 6075 is manifold: First, many employers are *already* under a State law obligation to provide benefits to pregnant disabled workers. Passage of the bill thus has little or no economic impact on such employers. Second, employers who operate in several States face different requirements depending on the State; likewise, the rights of pregnant employees depend on the laws of the State in which they are employed.[13]

Leg. Hist. at 157 (emphasis in original). The State's use of the House Report to support a claim that Congress approved of preferential state statutes is entirely misplaced. *See also*, Remarks of Senator Williams on S. 995: "This bill is merely reestablishing the law as it was understood prior to the Supreme Court's recent decision [in *Gilbert*]. Employers who were following the common interpretation of title VII before the Supreme Court's decision, and employers in the numerous States which require *equal benefits under State law*, have already adjusted to this principle." Leg. Hist. at 90 (emphasis added). There is no evidence in the legislative history of the PDA that Congress intended to allow the states to provide preferential treatment to employees disabled by pregnancy.

B. The Ninth Circuit Misconstrued this Court's Holding in *Newport News*.

The Ninth Circuit's reliance on *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983), to support its holding that the PDA constructs a floor for

[13] For example, at that time, five states—California, Hawaii, New Jersey, New York and Rhode Island—had temporary disability laws that required partial wage replacement for all disabled employees. *Id.*

disability benefits also is misplaced. *Newport News* contained no such holding.

In *Newport News*, this Court held that the company had discriminated against its *male* employees by providing "married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees." 462 U.S. at 684. This was hardly a holding that Congress mandated providing a minimum level of benefits to pregnant employees. Rather, the Court held that it was discriminatory *not* to provide male employees with *the same* coverage for their dependents as provided to female employees.

The Ninth Circuit is equally wrong in citing *Newport News* as providing a "framework for harmonizing the California statute and the PDA." 758 F.2d at 393, Petition for Cert. at A-5. The fact that Congress recognized that employers may have to *pay more* to achieve *equal* health coverage does not justify state laws that mandate *preferential* treatment of pregnant employees. In *Newport News*, the Court clarified Congress's goal of equal disability coverage for both sexes. California's goal is greater disability coverage for pregnant women. These two goals are inherently inconsistent and, for this reason, the California law cannot stand.

II. STATE STATUTES MANDATING PREFERENTIAL TREATMENT OF PREGNANT EMPLOYEES CONFLICT WITH TITLE VII AND ARE INVALID UNDER THE SUPREMACY CLAUSE.

A state law is invalid under the Supremacy Clause if it conflicts with federal law, or if Congress showed an intent to occupy the field.[14] *Transcontinental Gas Pipe*

[14] The second type of preemption is inapplicable here; Congress did not intend to occupy the entire equal employment opportunity field. *See* 42 U.S.C. §§ 2000e-7 and 2000h-4. As stated by this Court in *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85, 103 (1983), "Title VII is neutral on the subject of all employment practices it does not prohibit."

Line Corp. v. *State Oil and Gas Board of Mississippi*, 88 L.Ed.2d 732, 743 (1986); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). The Civil Rights Act itself also contains two preemption provisions. A state law that "purports to require or permit" unlawful employment practices is invalid under Title VII. § 708, 42 U.S.C. § 2000e-7. Similarly, Title XI preempts any state law that "is inconsistent with the purposes of this Act." § 1104, 42 U.S.C. § 2000h-4. The California law at issue here conflicts with federal law, requires unlawful employment practices, and is entirely inconsistent with the objectives of Title VII. For these reasons, the Chamber urges this Court to declare the state law null and void.

A. Preferential State Statutes Conflict With Title VII's Mandate of Equal Treatment.

California is not the only state that requires preferential treatment of employees disabled by pregnancy. At least two other states currently mandate "reasonable" leave of absence and reinstatement.[15] Four additional states impose other requirements. Massachusetts requires an eight week leave plus reinstatement.[16] New Hampshire and Washington mandate leave of absence for the period of physical disability resulting from pregnancy or childbirth, and reinstatement.[17] Puerto Rico

[15] *See* Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West Supp. 1985); Montana Maternity Leave Act, Mont. Code Ann. § 49-2-310 (at issue in *Miller-Wohl*, *see* n.3, *supra*).

[16] Mass. Gen. Laws Ann., ch. 149 § 105D (West Supp. 1985).

[17] New Hampshire Code of Admin. Rules Ann., Human Rights Commission Rules on Practice and Procedure, HUM 402.03 (Equity 1985); Washington Admin. Code, Human Rights Commission Admin. Rules, WAC 162-30-020(5) (1984).

mandates a four-week "rest" at half pay for pregnant workers both before and after birth, gives employees the option of choosing one week before and seven weeks after the birth instead, and guarantees reinstatement.[18]

Preferential state laws create compliance problems that are particularly onerous for multistate employers. Apart from the practical difficulties of ascertaining what each state deems to be a "reasonable" period of leave and tailoring personnel policies to comply, under the standard articulated by the Ninth Circuit, employers have no assurance that in the future states will not mandate even greater disparities in preferential treatment. If the Ninth Circuit is correct that the PDA merely sets a "floor beneath which benefits may not drop," where is the ceiling? States conceivably could mandate six months of leave, or a year, or two years, at half pay, or full pay. Congress clearly rejected all pregnancy-based classifications in the PDA, and declared equal treatment to be the floor *and* the ceiling.

Only employment policies that treat workers disabled by pregnancy the same as workers disabled for other reasons comply with Title VII. State laws requiring preferential treatment force employers to choose between complying with federal or state law, because they cannot comply with both without extending benefits, a result Congress clearly did not require of non-discriminating employers.[19] This Court has made it clear that the Supremacy Clause invalidates state legislation that makes compliance with both state and federal law impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S.

---

[18] Laws of Puerto Rico Ann., ch. 19, title 29 §§ 467, 468 (Equity 1985).

[19] *Accord*, Brief for the United States as Amicus Curiae filed in *Miller-Wohl* at 11 n.4 ("Congress repeatedly emphasized that it intended that employers be free to provide any level of benefits they wished—or none at all—so long as they did not use pregnancy as a criterion for alloctaing those benefits." (citations omitted)).

132, 142-143 (1963), or stands in the way of accomplishing the full purposes and objectives of Congress. *Hines* v. *Davidowitz*, 312 U.S. 52, 67-68 (1941). Preferential state laws do both, and must be struck down.

B. Preferential State Statutes Do Not Protect Employees from Disparate Impact Discrimination, Because Disparate Impact Must Be Proved and There Is No Evidence That Women Are More Adversely Affected by Disability Than Men Are.

The State argues that the California Code is consistent with Title VII because it protects pregnant employees from disparate impact discrimination. *See* Op. Cert. at pp. 17-19. The only way this statute can be construed to redress discrimination is if the California legislature is presumed to have concluded that *all* employment policies offering less than four months of leave and reinstatement for pregnancy disability have a disparate impact on women. Such a sweeping conclusive presumption would be invalid and, in any event, there is no evidence that California made this determination.

Unquestionably, the facially neutral leave or reinstatement policy of a particular employer may be proved to have a disparate impact on pregnant workers.[20] However, California has made no such showing about any particular leave policy, or even a general showing about

---

[20] *See, e.g., Abraham* v. *Graphic Arts International Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (employer's ten day ceiling on disability leave held to have disparate impact on female employees); EEOC Compliance Manual § 626.5, *reprinted in* EEOC Compliance Manual (BNA) at p. 626:0009 (a neutral policy denying any disability leave until an employee has been employed for a set period or has tenure may be unlawful *where it adversely affects female employees* and is not justified by overriding business necessity). *But see Daly* v. *Three Village Central School District*, 109 A.D.2d 772, 486 N.Y.S.2d 286 (1985) (school district's policy of denying extended leave of absence to any employee, male or female, held *not* to be discriminatory).

leave policies offering less than it seeks to mandate. The State made no attempt to analyze the effects of Cal Fed's gender-neutral policy on its male and female employees, and the Ninth Circuit expressly disavowed using disparate impact analysis as to Cal Fed's policy in particular or "inadequate" leave policies in general. 758 F.2d at 394, Petition for Cert. at A-7. As pointed out by Petitioner, there simply is no evidence that as a result of pregnancy, working women as a class are affected by disabilities to a greater extent than working men are. Petition for Cert. at 18.[21] Workers of both genders are afflicted with heart attacks, injured in accidents, and stricken by a variety of other disabling misfortunes.

California undertook no study of the impact of any particular employment policy, but rather simply determined legislatively that pregnant workers were to be accorded certain benefits, regardless of their employers' policies as to other workers. Such a *sui generis* mandate, treating pregnancy as a category unto itself meriting special treatment, was explicitly rejected by Congress, and outlawed by the PDA.

C. Preferential State Statutes Undermine the Objectives of Federal Law.

The PDA was designed to protect pregnant workers from employment practices *not* faced by other disabled workers. *See* Leg. Hist. at 67. It adopted equality of treatment as its standard, making benefits contained in existing personnel programs the measure of an employer's duty toward pregnant employees. Accordingly, employ-

[21] See the excellent discussion on this point in the *amicus* brief filed in the Ninth Circuit by the National Organization for Women, *et al.*, at pp. 8-10. *See also Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F. Supp. 1146, 1162 (W.D. Pa. 1974), *aff'd* as to finding of discrimination, 511 F.2d 199 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976) ("There is nothing in this record to show and nothing in our general experience indicates that the job-related incidence of disability for pregnancy is any greater or less than that for a prostatectomy.").

ment policies that treat workers disabled by pregnancy the *same* as other temporarily disabled workers comply with Title VII, *even though they may have adverse effects on pregnant workers.*[22]

The PDA "is not a maternity policy; it simply provides women with the benefits a man would receive for disability." 17 N.Y.U.J. Int'l L. & Pol., *infra* n.23, at 726.[23] Indeed, in its early interpretation of the PDA, the EEOC implemented congressional intent that workers disabled by pregnancy have no greater right to leave or reinstatement than do workers disabled for other reasons. *See* Questions and Answers on the Pregnancy

[22] *See, e.g., Eblin* v. *Whirlpool Corp.*, 36 Fair Empl. Prac. Cas. (BNA) 1632, 1635 (N.D. Ohio 1985) (policy of counting each day of disability leave, including maternity leave, in computing whether an employee has been absent excessively held not to have a disparate impact on female employees in violation of Title VII); *Cobb* v. *United States Merchant Marine Academy*, 592 F. Supp. 640, 643 (E.D.N.Y. 1984) (Naval Reserve's policy of denying a commission to all persons with temporary disabilities, including pregnancy, held valid under Title VII); *Mason* v. *Continental Insurance Co.*, 32 Fair Empl. Prac. Cas. (BNA) 578, 580 (N.D. Ala. 1983) (company policy of limiting disability leave and terminating employees who exceed their leave limits held not to violate Title VII); *Vuyanich* v. *Republic National Bank of Dallas*, 505 F. Supp. 224, 391 n.228, 392 (N.D. Tex. 1980), *vacated and remanded on other grounds*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 105 S. Ct. 567 (1984) (company's six month service prerequisite to sick or maternity leave and six month limit on duration of all disability leave held lawful, as there was no showing of any disparate impact on the class).

[23] Even commentators who argue for more generous maternity benefits agree that the PDA does not require employers to treat pregnant employees in any particular manner with regard to sick leave, disability benefits, or any other matter. *See, e.g.*, Note, *Equality in the Workplace: Is that Enough for Pregnant Workers?*, 23 J. Fam. L. 401, 416-18 (1985); Little, *Mother Load or Overload: The Need for a National Maternity Policy*, 17 N.Y.U.J. Int'l. L. & Pol. 717, 725 (1985); Krieger and Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U.L. Rev. 513, 518 (1983).

Discrimination Act, 44 Fed. Reg. 23,804 (1979) (codified at 29 C.F.R. § 1604 App.). The agency stated: "A woman unable to work for pregnancy-related reasons is entitled to . . . sick leave on the *same basis* as employees unable to work for other medical reasons." 29 C.F.R. § 1604 App., at Introduction (emphasis added). As to reinstatement, it stated: "*If* other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy." *Id.* (emphasis added).[24]

The EEOC had applied the same principle in decisions based on its 1972 Guidelines on Discrimination Because of Sex, 37 Fed. Reg. 6,836 (1972) (codified at 29 C.F.R. § 1604.10(b)), which predated the PDA. In fact, in EEOC Dec. No. 75-256, 11 Fair Empl. Prac. Cas. (BNA) 990, 992 (1975), the Commission upheld a reinstatement policy almost identical to Cal Fed's, under which the employer attempted to restore employees returning from disability leave to similar positions as soon as possible, but did not guarantee reinstatement. The Commission held that since the policy applied to all employees regardless of sex, and the employer's statistics indicated that the policy had no disparate impact on women, it did not violate Title VII.

---

[24] The Commission further elaborated:

> Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return *on the same basis as jobs are held open for employees on sick or disability leave for other reasons.*

29 C.F.R. § 1604.10 App. at Q. 9 (emphasis added). *See also,* EEOC Compliance Manual § 626.4, reprinted in EEOC Compliance Manual (BNA) at p. 626:0007 ("Although an employer is *not required to hold open* for any specific period of time the job of an employee on leave of absence for pregnancy-related reasons, the employer may not treat her less favorably than it treats other employees seeking to return to work after comparable absences for nonpregnancy reasons.") (emphasis added).

Federal law saves from preemption only state laws which do not conflict with it, and invalidates those that do. California's requirement of classifying workers on the basis of pregnancy and providing them different conditions of employment violates the PDA's standard of equal treatment, and thus must be struck down.

III. NULLIFICATION OF PREFERENTIAL STATE STATUTES IS THE ONLY APPROPRIATE REMEDY.

A. Substantial Changes in Legislative Intent Must Be Made By Legislatures, Not Courts.

The conflict between preferential state statutes and the PDA is irreconcilable. Any suggestion that this Court should cure the deficiencies in such state laws by extending the preferences they mandate to all employees must be rejected as undue judicial infringement on the legislative prerogatives of the state.

The California legislature was free to mandate four months of leave and reinstatement for all employees when it enacted this statute, or at any thereafter, and likewise is free to do so in the future. Indeed, in response to federal judicial decisions of the early 1970's that invalidated state wage orders because they applied only to female workers,[25] the California legislature amended provisions of the Labor Code to authorize enactment of minimum standards for all workers in the state.[26] The

---

[25] *See, e.g., Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219, 1225-27 (9th Cir. 1971); *Homemakers, Inc.* v. *Division of Industrial Welfare*, 356 F. Supp. 1111 (N.D. Cal. 1973), *aff'd*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976).

[26] *See Industrial Welfare Comm'n* v. *Superior Court of Kern County*, 613 P.2d 579, 583-84 (Cal.), *cert. denied*, 449 U.S. 1034 (1980), *citing* Cal. Stats. 1972, ch. 1122, §§ 2-6, pp. 2153-55; Stats. 1973, ch. 1007, §§ 1.5-4, pp. 2002-2003. In addition, the California Constitution was amended to specifically empower the legislature to confer on a commission power to provide for minimum wages for all employees. Cal. Const. art. XIV, § 1. The precursor to this section empowered the legislature to establish a minimum wage for *women and minors*. Cal. Const. art. XX, § 17½ (prior to 1970).

California legislature thus knows how to accomplish extension and can choose to do so with this statute.

It is not a judicial function to rewrite statutes. This work is for the legislative branch.[27] As stated by one commentator: "When the court passes on the constitutionality of a[n] [underinclusive] statute . . ., it concludes its essentially judicial business. If it declares the statute unconstitutional as written, the remaining task is essentially legislative."[28] The California Supreme Court itself rejected judicial extension in *Arp* v. *Workers' Compensation Appeals Board*, 563 P.2d 849, 850 (Cal. 1977), declining to "anticipat[e] a legislative response to our constitutional conclusion" and holding that it would be "inappropriate and unwise to attempt to fashion a make-shift judicial cure by adopting an interpretation which extends the benefit . . . . Similarly, this Court has recognized that the judiciary is ill-equipped to resolve definitional and policy questions in attempting to determine what a legislature intended. *Califano* v. *Westcott*, 443 U.S. 76, 95 n.1 (1979).[29]

---

[27] *See United States* v. *Rodgers*, 466 U.S. 475, 484 (1984) ("[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress"); *Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973) (the court is not free to "create a program quite different from the one the legislature actually adopted"); *Doctors Hospital, Inc.* v. *Recio*, 383 F. Supp. 409, 417 (D.P.R. 1974) (judicial extension of rest period benefits to male employees would "amount to usurpation of the legislative power that has been vested exclusively in the Legislature of Puerto Rico").

[28] Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 317 (1979).

[29] The lower courts have followed this mandate of judicial restraint. *See, e.g., Community & Economic Development Ass'n of Cook County* v. *Suburban Cook County Area Agency on Aging*, 770 F.2d 662, 667 (7th Cir. 1985) ("the judiciary may not extend the coverage of [a statute] simply because it might disagree with the legislature's allocation of rights and remedies"); *Delta Air Lines, Inc.* v. *Kramarsky*, 650 F.2d 1287, 1297 (2d Cir. 1981), *aff'd in part, vacated in part on other grounds sub nom. Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) ("If the HRL mandated discrimination [against male employees by compelling employers to provide disability benefits for pregnant employees], then, of course, it was invalid under the Supremacy Clause."); *Day* v. *W.A. Foote Memorial Hospital, Inc.*, 316 N.W.2d 712, 714 (Mich. 1982) (court invalidated statutory presumption of dependency of widows; found extension inappropriate); *Vick* v. *Pioneer Oil Co.*, 569 S.W.2d 631 (Tex. Civ. App. 1978) (court invalidated statutory provision requiring overtime pay for female employees only; found extension inappropriate); *State* v. *Fairfield Communities Land Co.*, 538 S.W.2d 698, 700 (Ark.), *cert. denied*, 429 U.S. 1004 (1976) ("Of course it follows that if the Arkansas statute is now invalid, its benefits cannot simply be extended to male employees under the *Potlach* rationale.").

Nor may a court completely transform a statute in the name of interpreting the will of the legislature. *Welsh* v. *United States*, 398 U.S. 333, 351 (1970) (Harlan, J., concurring). As Justice Harlan stated, "[w]hen the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that has been plainly marked by the statute." *Id.* at 354. Extension of the benefits mandated by preferential statutes is particularly inappropriate where it would yield a large percentage increase in the number of persons covered by the statute. *See, e.g., Bastardo* v. *Warren*, 4 Empl. Prac. Dec. (CCH) ¶ 7635 at p. 5503 (W.D. Wis. 1970). Such a result creates a substantial doubt that the legislature would have enacted the statute, had it known it would be so construed.[30] To avoid improper judicial encroachment into the legislative arena, this Court should nullify the California statute.

---

[30] *See also* Beers, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum. J.L. & Soc. Prob. 115, 129 (1975) ("Numbers may also be a consideration in the extension of women's protective labor legislation to cover men where the extension would more than double the number of persons entitled to a benefit . . . that must be paid out of the employer's pocket.").

B. Extension of Benefits By this Court Would Usurp the Powers of the State.

Concerns of federalism also militate against federal judicial amendment of state laws. As the Ninth Circuit itself said in *Homemakers, Inc.* v. *Division of Industrial Welfare*, 509 F.2d 20, 22 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976), although judicial expansion of benefits might provide the necessary consistency with federal law, it impermissibly "would usurp the legislative power vested solely in the state." Accordingly, the court found "judicial restraint" warranted, and rejected extension. *Id.*[31]

The Sixth Circuit similarly concluded: "A federal court ought not to exercise state legislative functions. It is without power to do so, and furthermore it has not developed proficiency in that field." *Joseph Skilken & Co.* v. *City of Toledo*, 528 F.2d 867, 881 (6th Cir. 1975), *vacated*, 429 U.S. 1068, *aff'd on remand*, 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977). This Court should not interfere with the legislative prerogatives of the State, but rather should recognize the invalidity of the California law, and simply declare it invalid.

C. Nothing Prevents This Court From Invalidating Preferential State Statutes.

An original provision of the PDA set a one year moratorium on an employer's ability to reduce benefits in order to come into compliance with the Act.[32] This pro-

---

[31] *Accord, Jet Industries, Inc.* v. *United States*, 603 F. Supp. 643, 646 (W.D. Tex. 1984), *aff'd*, 777 F.2d 303 (5th Cir. 1985) ("[i]t is not this court's place to legislate new tort law for Texas or for the United States"); *Doctors Hospital, Inc.* v. *Recio*, 383 F. Supp. at 417 ("a Federal court should not 'amend' the provisions of [a state law] to obviate a conflict with the Federal law"); *Burns* v. *Rohr Corp.*, 346 F. Supp. 994, 997 (S.D. Cal. 1972) ("[a] federal court should not 'amend' the state's labor laws to obviate a conflict").

[32] Section 3 of Public Law 95-555 provided that:

> Until the expiration of a period of one year from the date of enactment of this Act [Oct. 31, 1978] . . . *no person who* on the date of enactment of this Act *is providing* either by direct payment or by making contributions to a fringe benefit fund or insurance program, *benefits* in violation with this Act . . . *shall* in order to come into compliance with this Act, *reduce* the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program . . . .

42 U.S.C.A. § 2000e(k) note, Readjustment of Benefits (emphasis added).

vision has been cited as authority for judicial extension rather than nullification of preferential state statutes. Yet it is clear from the express language of that provision that the prohibition against benefit reduction applied only to employers, not to courts or legislatures, and expired after one year. As stated by Senator Williams, manager of the Senate bill: "Employers will . . . be free to adjust benefits for any reason after one year . . . ." Leg. Hist. at 64.

Notwithstanding this misinterpretation of the effect of the moratorium on benefit reduction, nullification of preferential state laws would not reduce the benefits provided by employers like Cal Fed, which already have gender-neutral policies. Nor would nullification preclude other employers who currently provide preferential treatment to employees disabled by pregnancy from reducing benefits to eliminate the preference, and achieve the equal treatment the PDA requires. This Court has "often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others." *Heckler* v. *Mathews*, 465 U.S. 728, 740 n.8 (1984). The PDA's prohibition on reducing benefits was intended only to bring employers into compliance with federal law, not to cure constitutional deficiencies in state law, and in no way prevents this Court from invalidating the California statute.

CONCLUSION

For the reasons stated above, the Chamber urges this Court to declare null and void state statutes which mandate preferential treatment of employees disabled by pregnancy.

Respectfully submitted,

ROBIN S. CONRAD
Counsel of Record
PAULA J. CONNELLY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae
Chamber of Commerce
of the United States

April 4, 1986

AMICUS CURIAE

BRIEF

FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

In The
Supreme Court of the United States
October Term, 1985

California Federal Savings and Loan Association, Merchants and Manufacturers Association, and California Chamber of Commerce,
Petitioners,
v.
Mark Guerra, Department of Fair Employment and Housing, Cruz F. Sandoval, and Fair Employment and Housing Commission of the State of California,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

Robert E. Williams
Douglas S. McDowell
Lorence L. Kessler *
McGuiness & Williams
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

30 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE CALIFORNIA STATUTE MANDATING SPECIAL TREATMENT FOR EMPLOYEES DISABLED BY PREGNANCY IS IN DIRECT CONFLICT WITH FEDERAL LAW WHICH PROHIBITS PREGNANCY-BASED DISTINCTIONS BY EMPLOYERS	7
A. The Plain Language Of Title VII, As Amended By The Pregnancy Discrimination Act Of 1978, Prohibits Sex-Based Classifications Of The Type Required By The California Pregnancy Law	7
B. The Legislative History Of The Pregnancy Discrimination Act Reflects An Unambiguous Congressional Intent To Prohibit Policies Which Treat Pregnancy As *Sui Generis*	9
C. The Discriminatory Classifications Required By The California Pregnancy Law Cannot Be Justified As A Means To Title VII's Goal Of Equal Opportunity	13
II. BECAUSE OF THE CONFLICT BETWEEN FEDERAL LAW AND THE CALIFORNIA PREGNANCY LAW, THE CALIFORNIA STATUTE IS PREEMPTED BY TITLE VII AND SHOULD BE INVALIDATED BY THIS COURT	19
A. The California Pregnancy Law Does Not Qualify As A Nondiscrimination Statute Being Applied To An Area Not Covered By Title VII	19
B. The Proper Remedy Is For This Court To Invalidate, Rather Than Extend, The California Pregnancy Law	21
CONCLUSION	25

TABLE OF AUTHORITIES

Cases — Page

Alexander v. Choate, 105 S. Ct. 712 (No. 83-727, Jan. 9, 1985) 3, 15
Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 3
Califano v. Westcott, 443 U.S. 76 (1979) 22
California Federal Savings & Loan v. Guerra, 758 F.2d 390 (9th Cir. 1985) ..... *passim*
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 21
General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 9, 11
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 12, 15
Homemakers, Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976) 22
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 3
Kansas Ass'n of Commerce and Industry v. EEOC, 33 EPD ¶ 34,180 (D. Kan. 1983) 13
Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 3
Newport News Shipbuilding & Dry Dock Company v. EEOC, 462 U.S. 669 (1983) 9, 13, 17-18
Shaw v. Delta Air Lines, Inc., 463 U.S. 324 (1983) .. 20
Skinner v. Oklahoma, 316 U.S. 535 (1942) 24
United Steelworkers v. Weber, 443 U.S. 193 (1979) 13
Welsh v. United States, 398 U.S. 333 (1970) 23, 24

Federal Statutes

Civil Rights Act of 1964, as amended

Title VII, Section 701(j), 42 U.S.C. § 2000e-(j) 15
Title VII, Section 701(k), 42 U.S.C. § 2000e-(k) 4, 8
Title VII, Section 708, 42 U.S.C. § 2000e-7 20
Title IX, Section 1104, 42 U.S.C. § 2000h-4 20

TABLE OF AUTHORITIES—Continued

Page

The Rehabilitation Act of 1973,
Section 503, 29 U.S.C. § 793 15
Section 504, 29 U.S.C. § 794 15

State Statutes

Calif. Gov't Code § 12945(b)(2) 3-4

Legislative Materials

H.R. Rep. No. 948,
95th Cong., 2nd Sess. (1978) 10-11
S. Rep. No. 331, 95th Cong., 1st Sess. (1977) 9-10
123 Cong. Rec. 29645 (1977) 10

Regulations

29 C.F.R. § 1604.10(b) 12
29 C.F.R. Part 1604 (Appendix)
Question and Answer No. 9 13
29 C.F.R. Part 1604 (Appendix)
Question and Answer No. 29 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-494

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, MERCHANTS AND MANUFACTURERS ASSOCIATION, and CALIFORNIA CHAMBER OF COMMERCE,

Petitioners,

v.

MARK GUERRA, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, CRUZ F. SANDOVAL, and FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief with the written consent of all parties pursuant to Rule 36. The letters of consent have been filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general

public in sound government policies, procedures and requirements relating to nondiscriminatory employment practices. The Council's membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment opportunity policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal opportunity.

Substantially all of the Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, as well as other federal equal opportunity statutes and regulations. As such, they are vitally concerned with the interpretation and application of state statutes that are directly in conflict with, or which require conduct which is inconsistent with, federal equal employment opportunity requirements. Thus, the members of the Council have a significant interest in the issue presented in this case; that is, whether a state statute mandating special treatment of employees disabled by pregnancy, without regard to the treatment of employees disabled by other conditions, is inconsistent with the federal law prohibiting employers from making distinctions on the basis of pregnancy.

Because of its interest in this particular question, EEAC participated as amicus curiae before the United States Court of Appeals for the Ninth Circuit in the instant case, and has filed an amicus curiae brief in this Court in the case of *Miller-Wohl Company, Inc. v. Commissioner of Labor and Industry, State of Montana* (84-1545), on appeal from the Supreme Court of Montana, which involves a similar state pregnancy statute. EEAC also has filed briefs as amicus curiae in this Court in a number of other cases raising important equal employment issues relating to pregnancy, gender classifications, the use of statistical evidence, and the relationship between state and federal nondiscrimination law. *Newport News Shipbuilding & Dry Dock Company v. EEOC*, 462 U.S. 669 (1983); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Alexander v. Choate*, 105 S. Ct. 712 (1985); and *Kremer v. Chemical Construction Corp.*, 456 U.S. 167 (1982).

STATEMENT OF THE CASE

This is an action challenging the validity of a California statute [1] which requires employers to pro-

---

[1] Section 12945(b) of the California Government Code provides in pertinent part that, under the California Fair Employment and Housing Act, it is an unlawful employment practice:

> For any employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . .
>
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not

vide special treatment for workers disabled by pregnancy, regardless of the treatment provided to workers who suffer a similar degree of disability due to conditions other than pregnancy. The California pregnancy law was being enforced by the Respondents, state officials and agencies, against the Petitioners and other employers subject to the provisions of Title VII of the federal Civil Rights Act of 1964. Title VII, as amended by the Pregnancy Discrimination Act of 1978,[2] requires employers to treat workers disabled by pregnancy "the same" as other workers with similar ability or inability to work.

The leave provision in the California pregnancy law has been interpreted by Respondents to require

---

exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth or related medical conditions.

This provision, as interpreted by the Defendant-Respondent state agencies and officials, is referred to hereinafter as the "California pregnancy law."

[2] Section 701(k) of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, provides in pertinent part:

> The terms of "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions *shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work*, and nothing in Section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (Emphasis supplied).

that employers must reinstate an employee returning from a pregnancy leave to the same job. Pursuant to the California statute, the Respondents have created a rebuttable presumption that when a worker affected by pregnancy takes leave from her job, the employer should hold the job open or use temporary employees to fill the job while the pregnant employee is on leave. If the employer can demonstrate business necessity for not reinstating the employee to the same job, the employer nonetheless is required to make reasonable efforts to reinstate the returning employee to a similar job.

The district court found that the California pregnancy law discriminates on the basis of sex in violation of Title VII's prohibition on sex discrimination and that the special treatment required by the California law is inconsistent with Title VII. The district court concluded that Title VII preempts the California law and thus declared the California law invalid. The United States Court of Appeals reversed the lower court, and upheld the California statute as not inconsistent with Title VII. *California Federal Savings and Loan Association v. Guerra*, 758 F.2d 390 (1985). The plaintiff employers petitioned this Court for a writ of certiorari, which was granted on January 13, 1986.

SUMMARY OF ARGUMENT

The Pregnancy Discrimination Act of 1978 added two basic principles to Title VII of the Civil Rights Act. The first is the proposition that, in the workplace, distinctions based on pregnancy are distinctions based on sex and, as such, are prohibited by federal law. The second is the principle that nondis-

criminatory treatment of pregnant workers requires that they be treated the same as nonpregnant workers with a similar degree of ability or disability.

The California pregnancy law is inconsistent with each of these principles. The California statute mandates a special leave policy with guaranteed reinstatement for workers disabled by pregnancy, regardless of what leave policy is provided for workers who suffer a similar degree of disability from conditions other than pregnancy. Because of this conflict between the California statute and federal law, the state statute is preempted by Title VII and should be ruled invalid by this Court.

In upholding the California statute, the Ninth Circuit erred in its interpretation of the federal pregnancy discrimination law. Although the provisions of the federal law are set forth in straightforward and unambiguous language, the appellate court erroneously suggested that there is a tension between the two basic principles noted above. Then, in attempting to resolve that tension, the Ninth Circuit ignored the legislative history which in very clear terms sets forth the Congressional view that pregnant workers are to be treated the same as other workers, not affected by pregnancy, who are similar in their ability or inability to work. The state statute requires employers to make pregnancy-based distinctions for which employers could be liable under federal law. Because of the inconsistency between the state law and federal law, this Court should declare the California law invalid.

ARGUMENT

I. THE CALIFORNIA STATUTE MANDATING SPECIAL TREATMENT FOR EMPLOYEES DISABLED BY PREGNANCY IS IN DIRECT CONFLICT WITH FEDERAL LAW WHICH PROHIBITS PREGNANCY-BASED DISTINCTIONS BY EMPLOYERS.

The heart of the federal law prohibiting pregnancy discrimination is the basic proposition that a distinction based on pregnancy is a distinction based on sex. When Congress added the Pregnancy Discrimination Act to Title VII of the Civil Rights Act, Title VII's ban on sex-based distinctions became a ban on pregnancy-based distinctions as well. In direct conflict with this federal statutory scheme, the California pregnancy law and regulations at issue in this case require special treatment for employees disabled by pregnancy, regardless of whether similar treatment is accorded to employees disabled by other conditions. Such special treatment is not permitted by Title VII, as amended by the Pregnancy Discrimination Act, which explicitly requires that employees affected by pregnancy are to be treated "the same" as other persons with similar ability or inability to work.

A. The Plain Language of Title VII, As Amended by the Pregnancy Discrimination Act of 1978, Prohibits Sex-Based Classifications Of The Type Required by The California Pregnancy Law.

The language of the pregnancy discrimination amendment to Title VII of the Civil Rights Act is clear and straightforward. The amendment begins with a definitional statement that discrimination on the basis of sex includes discrimination on the basis of pregnancy. This is followed by a clear and pre-

cise statement as to how issues involving pregnancy are to be treated in an employment setting.

> Women affected by pregnancy, childbirth or related medical conditions shall be treated *the same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work.*

42 U.S.C. Section 2000e(k) (Emphasis added).

This statutory language is notable, not simply for its clarity, but because it goes beyond a mere declaration that pregnancy discrimination is illegal. The law affirmatively states how an employer is expected to resolve employment issues related to pregnancy. Specifically, pregnant workers are to be treated the "same" as other workers with a similar degree of ability or disability. The plain and ordinary meaning of the words in the statute is that employees disabled by pregnancy are to be treated no differently than employees similarly disabled by some other condition. There is no language in the statute to indicate anything less than an unambiguous prohibition of pregnancy-based classifications.

In its analysis of the law, however, the Ninth Circuit detected a tension between the two clauses in the pregnancy discrimination amendment. Although the nature of that perceived tension is somewhat ambiguous, the court apparently found the demand for pregnancy-neutral policies to be at odds with the clause defining pregnancy discrimination as a form of sex discrimination. The amicus respectfully submits that the language of the statute is quite clear, and the so-called tension appears only when one tries to contort the language of the statute to permit special treatment for pregnant workers.[3] Nonetheless, if the Ninth Circuit did find the language of the statute to be ambiguous, it should have turned to the legislative history, which leaves no doubt that Congress desired to prohibit classifications based on pregnancy.

B. The Legislative History Of the Pregnancy Discrimination Act Reflects An Unambiguous Congressional Intent To Prohibit Policies Which Treat Pregnancy As *Sui Generis*.

The Pregnancy Discrimination Act was passed by Congress as a reaction to this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that an exclusion of pregnancy from a disability benefits plan providing general coverage is not gender-based discrimination. By amending the law to provide that a distinction based on pregnancy is a distinction based on sex, Congress sought to make it illegal for an employer to treat pregnancy as a condition different from other disabilities. The intent of Congress is set forth clearly throughout the legislative history. The Report of the Senate Committee on Labor and Human Resources is most emphatic:

> [T]he bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*,

---

[3] In its decision in *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983), this Court did not read the two clauses of the statute to be at odds with one another. Rather, the Court observed that the "meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees." 462 U.S. at 678 n.14.

> without regard to its functional comparability to other conditions.

S. Rep. No. 331, 95th Cong., 1st Sess., p. 4 (1977). Having rejected a *sui generis* approach to pregnancy, Congress was also clear in stating specifically what was required of employers:

> Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone, but on the actual effects of that condition on their ability to work.

Id. In short, the intention was that this legislation would "simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work." *Id.* Thus, speaking during the debate on the Senate floor, Senator Stafford stated:

> When an employer treats pregnancy . . . the same as [that employer] treats any other disabling condition, then [the employer] has complied with this bill.

123 Cong. Rec. 29645 (1977).

The Report of the House Committee on Education and Labor expresses the same intent.[4] The House

[4] As with the Senate Report and the language of the statute itself, the language in the House Report expressed the basic principle behind this legislation as being an intent to assure that all workers are treated equally in terms of their actual ability: "The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work." H.R. Rep. 948, 95th Cong., 2d Sess. p. 4 (1978). Nothing in the House Report supports the contention that special treatment of pregnant workers is necessary to assure equality. Specifically, in discussing disability and sick leave benefits, the House Report stated that:

> This bill would prevent employers from treating pregnancy, childbirth and related medical conditions in a manner different from their treatment of other disabilities. In other words, this bill would require that women disabled due to pregnancy, childbirth or other related medical conditions be provided the same benefits as those provided other disabled workers.

Id. at 5.

Report also disposes of the notion, reflected in the Ninth Circuit's opinion, that some pregnancy-based classifications are acceptable:

> As an amendment to Title VII, this bill will apply to all aspects of employment—hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority and other conditions of employment currently covered by Title VII. Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute.

H.R. Rep. No. 948, 95th Cong., 2d Sess., p. 4 (1978). Thus, the legislative history gives no support to the argument that Title VII permits employers to use pregnancy-based classifications so long as those classifications are beneficial to pregnant workers. Indeed, the legislative history leaves no room for a statute such as the California pregnancy law which depends, just as surely as did the Court's decision in *Gilbert*, on the rationale that a pregnancy-based distinction need not be sex discrimination.

The Ninth Circuit, however, failed to consider seriously the legislative history of the Pregnancy Discrimination Act. The court also ignored the man-

ner in which that law has been interpreted by the federal agency charged with enforcement of the law, the Equal Employment Opportunity Commission. The guidelines issued by the Commission are consistent with the statutory language and the legislative history indicating that disabilities caused by pregnancy are to be treated the same as disabilities caused by other medical conditions.[5] The guidelines state specifically that policies with respect to the duration of leave are to be applied to pregnancy disability on the same terms and conditions as they are applied to other disabilities.[6] The evenhanded treatment which Congress intended to be applied to both pregnancy and non-pregnancy disabilities is reflected as well in the "Questions and Answers on the Pregnancy Discrimination Act" published by the EEOC.

---

[5] In interpreting Title VII, the Commission's guidelines are generally accorded deference by the courts, particularly where "the Act and its legislative history support the Commission's construction." See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

[6] The EEOC guidelines, at 29 C.F.R. § 1604.10(b), state:

> Disabilities caused or contributed to by pregnancy . . . , for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health, or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.

In Question and Answer No. 9, the Commission states specifically that a job is to be held open for a pregnant employee on disability leave "on the same basis as jobs are held open for employees on sick or disability leave for other reasons."[7] In Question and Answer No. 29, the Commission interprets Title VII as prohibiting an employer from providing extended benefits only for pregnancy-related medical conditions and not for other medical conditions.[8]

C. The Discriminatory Classifications Required By The California Pregnancy Law Cannot Be Justified As A Means To Title VII's Goal of Equal Opportunity.

The Ninth Circuit's decision upholding the California pregnancy law acknowledged that the state statute required special treatment for pregnant workers, but concluded that special treatment was permissible because the stated goal of the statute is equal employment opportunity. In reaching this conclusion, the court erred by brushing aside the district court's ruling that the classifications required by the state law constitute sex discrimination against male workers.[9]

---

[7] 29 C.F.R. Part 1604 (Appendix).

[8] 29 C.F.R. Part 1604 (Appendix). See *Kansas Ass'n of Commerce and Industry v. EEOC*, 33 EPD ¶ 34,180 (D. Kan. 1983), which upheld EEOC's interpretation because such extended benefits would violate "Title VII's basic ban on sex discrimination, by extending greater protection to women than to men." 33 EPD at 32,580.

[9] This Court's decision in *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 681 (1983), indicates that Title VII, as amended by the Pregnancy Discrimination Act, protects both females and males against pregnancy-based distinctions.

Just as critical, however, was the Ninth Circuit's failure to recognize that the federal Pregnancy Discrimination Act explicitly sets forth a standard of nondiscriminatory conduct. The California law would require conduct inconsistent with that standard, and thus the state law cannot be said to serve the same goal as the federal law.

The Pregnancy Discrimination Act provides "a common-sense test of whether a policy—or a statute —affords equal treatment to women who are pregnant." 758 F.2d at 396. As the language of the statute and its legislative history demonstrate in the clearest of terms, that common-sense test of equality is whether pregnant workers are treated the same as other employees on the basis of their ability or inability to work. Inexplicably, the Ninth Circuit ignored this basic test. Instead, the court suggested that the measure of whether a policy affords equal treatment to pregnant workers is whether that policy furthers Title VII's purpose of achieving equality of employment opportunities. 758 F.2d at 396. In applying this measure, the Ninth Circuit erred by overlooking the very standard of equal opportunity which Congress adopted as part of the Pregnancy Discrimination Act.

On a theoretical level, of course, equality could be defined in different ways. To some, equality may mean a system which treats all persons alike without regard to their differences. To others, equality may mean a system which recognizes differences and seeks to accommodate those differences through special treatment. But, on the particular issue of how pregnancy is to be treated in an employment setting, we do not start with a blank slate. Congress did not sanction special treatment for pregnancy-related dis-

abilities when it enacted the Pregnancy Discrimination Act in 1978.[10]

Through that amendment to Title VII, Congress has made it clear that equality of opportunity is defined as prohibiting distinctions based on pregnancy and requiring that workers disabled by pregnancy are to be treated the same as workers disabled for other reasons.[11] Thus, contrary to the Ninth Circuit's

---

[10] Title VII itself is a statute aimed at requiring equal treatment rather than equal results. "Discriminatory preference for any group, minority or majority, is precisely what Congress has proscribed." *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971). When Congress has intended to require conduct other than equal treatment as the means of assuring equal opportunity, that intention has been reflected in statutory language. See, *e.g.*, Section 701(j) of Title VII, 42 U.S.C. § 2000e(j), which provides for limited workplace accommodation of an employee's religious practices. Similarly, in Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, Congress provided for affirmative action to accommodate individual disabilities. The Pregnancy Discrimination Act contains no language to indicate Congress intended an "accommodation" standard for dealing with pregnancy. Nor does the Act indicate that Congress sought a standard requiring affirmative efforts or preferential treatment. See note 13, *infra*.

[11] Even assuming that an evenhanded policy may have different results for groups having varying degrees of disability, those results would not be "adverse impact" within the meaning of our discrimination laws. As this Court stated in *Alexander v. Choate*, 105 S. Ct. 712, 722 (1985), in rejecting the argument that a state government's reduction of hospital care has an impermissible adverse impact on handicapped persons,

> Section 504 [of the Rehabilitation Act of 1973, 29 U.S.C. § 794], seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assist-

rationale, a statute requiring special treatment for pregnant workers cannot be justified as a "means to the goal of employment opportunity." [12] By its very nature, a statute requiring such special treatment stands as an obstacle to accomplishment of the specific goal of equal opportunity defined by Congress in the Pregnancy Discrimination Act, *i.e.*, "that women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."

This same flaw is evident throughout the Ninth Circuit's opinion upholding the California statute. The court rejected the idea that Title VII requires employers to be blind to pregnancy, but the court failed to recognize that the federal law envisioned a workplace in which pregnancy disability was treated the same as other disabilities. While Congress did not command employers to ignore a disability, it clearly did require employers to be blind to the sex-specific causes of disability. A similar error is apparent in the Ninth Circuit's unsupported suggestion that the Pregnancy Discrimination Act was intended not as a "ceiling" on pregnancy benefits, but as a "floor" on which the States are permitted to build. The court failed to recognize that the primary feature of the structure created by the federal pregnancy discrimination law is its evenhanded approach to pregnancy as being one of many conditions which may cause

---

ance. . . . The Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be construed.

[12] 758 F.2d at 396.

worker disability. To whatever extent States may be free to add to this structure, they can do so only so long as they maintain the essential balance which Congress built into the original structure.[13]

Indeed, this Court's decision in *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983), makes plain that the Pregnancy Discrimination Act requires that both male and female workers are to be treated the same and that "*all* individuals" —both male and female—are protected by Title VII. *Id.* at 681. Justice Stevens' opinion states that:

> The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions *less*

---

[13] The Ninth Circuit's decision incorrectly equates the special treatment required under the California law with the affirmative action plans adopted voluntarily by employers to offset the effects of past discrimination. 758 F.2d 396 n.7. In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), cited by the Ninth Circuit as support for the principle of unequal treatment, this Court held that Title VII does not prohibit private, *voluntary* race-conscious affirmative action efforts that were designed to eliminate a manifest imbalance in an employer's workforce, that were temporary in nature, and that did not unnecessarily trammel the interests of non-minority employees. The California statute, however, *imposes* an *involuntary* obligation upon employers, contrary to *Weber's* holding that Title VII does not *require* employers to engage in the type of preferential treatment sanctioned by that decision. Moreover, the California statute does not remedy an imbalance in workforce opportunities, but rather provides employees on maternity leave special benefits not enjoyed by other employees—both male and female—who have experienced a different disability. Finally, California's statute has no end point, but imposes a permanent obligation upon employers to provide this preference. Thus, the *Weber* decision is not relevant to this issue and need not be addressed by the Court in this case.

> *favorably* than other medical conditions. Thus petitioner's plan unlawfully gives married male employees a benefit package for their dependents that is *less inclusive* than the dependency coverage provided to married female employees.

Id. at 684 (Emphasis added). Accordingly, *Newport News* in no way supports state action to mandate special treatment for one group on the basis of sex. It merely states that a pregnancy-related condition cannot receive less favorable treatment than other conditions.[14]

---

[14] The Ninth Circuit observed that this Court extended coverage under the Act to the spouses of male employees in *Newport News*, even though the cost of providing complete health insurance coverage for the dependents of male employees might exceed the cost of providing such coverage to the dependents of female employees. The Ninth Circuit's emphasis on this fact as an indication that the statute does not require equal treatment is, again, a product of that court's failure to recognize the basic definition of equality which Congress built into the federal statute.

This Court's decision in *Newport News* stands for the proposition that pregnancy-based classifications are improper in an employment context, even if the elimination of pregnancy-based distinctions results in the expenditure of more benefit dollars on the dependents of male employees than on the dependents of female employees. The potential for a difference in the number of dollars expended on males and females is irrelevant, not because the PDA sanctions unequal treatment to achieve equality, but because the key criterion under the PDA is whether the employer's policy is pregnancy-neutral. Thus, the Ninth Circuit erred in treating a difference in the number of "pregnancy disability days" under the California statute as analogous to the difference in the number of "pregnancy disability dollars in *Newport News*." 758 F.2d at 396. A difference in the number of pregnancy disability days cannot be overlooked here because that difference is the direct result of a policy which, admittedly, is not pregnancy-neutral.

The Ninth Circuit sought to diminish the discriminatory treatment required by the California pregnancy law on the ground that male employees suffer no loss by not having a right to pregnancy leave. This observation overlooks the fact that male employees may be denied a disability benefit, solely on the basis of their sex, which the law requires employers to give to pregnant employees.

Sound reasons support Congress' prohibition of such a discriminatory classification. Indeed, there is a concern here that goes beyond any loss suffered by male employees because of such classifications. That the California law was adopted with the best of intentions does not distinguish it from the protective legislation passed by many states earlier this century to "protect" women in the workplace by creating special classifications for them. Congress recognized that continued use of such classifications ultimately promotes the very stereotypes which were often a barrier to women seeking to be treated as individuals in the workplace.

II. BECAUSE OF THE CONFLICT BETWEEN FEDERAL LAW AND THE CALIFORNIA PREGNANCY LAW, THE CALIFORNIA STATUTE IS PREEMPTED BY TITLE VII AND SHOULD BE INVALIDATED BY THIS COURT.

A. The California Pregnancy Law Does Not Qualify As A Nondiscrimination Statute Being Applied To An Area Not Covered By Title VII.

Where a state law requires action in conflict with a federal law, the state statute must give way. The preemption provisions in the Civil Rights Act of 1964 make clear that state laws may not "require or permit the doing of any act which would be an unlawful

employment practice" [15] under Title VII. And even though Title VII is not to be construed as indicating an intent to occupy the field, state laws which are "inconsistent" with the purposes of Title VII are to be invalidated.[16] The California pregnancy law fails on both counts, because it mandates a pregnancy-based classification which Title VII prohibits as illegal sex discrimination.

In discussing the preemption of state laws by Title VII, this Court has observed that Title VII

> does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 (1983). Relying on this language, the Ninth Circuit in its opinion below concluded that Title VII's provisions on preemption are too narrow to reach the California pregnancy law. 758 F.2d at 394. This conclusion is flawed, however, because it cannot be said that pregnancy discrimination is an area not covered by Title VII. Nor is the California law a "nondiscrimination" statute because, by its language, it requires special treatment for some workers on the basis of a sex-based classification which Title VII regards as discrimination.[17]

While both statutes may have been enacted with a common intent to prevent pregnancy discrimination, the method adopted in the state law conflicts with the federal law. The Pregnancy Discrimination Act did more than set out an objective of eliminating pregnancy discrimination; it set out specific guide-

[15] See 42 U.S.C. § 2000e-7.

[16] See 42 U.S.C. § 2000h-4.

[17] See note 10, *supra*.

lines for defining and combatting the discrimination. Therefore, the state law must be consistent with the federal law's method, not simply its intent. As this Court stated in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963):

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives. . . . A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . . .

373 U.S. at 142-43.

In the instant case, the conflict between the federal and the state law is irreconcilable. It is impossible for an employer to grant preferential treatment to women disabled by pregnancy, as mandated by the state law, and avoid Title VII liability unless it gives the same benefits to employees who are disabled for reasons other than pregnancy.

B. The Proper Remedy Is For This Court To Invalidate, Rather Than Extend, The California Pregnancy Law.

In the courts below, it was suggested that the discriminatory distinction built into the California pregnancy law could be cured if the statute were extended to require a four-month leave and reinstatement to the same job for all disabled workers, rather than for only those workers disabled by pregnancy. The district court properly rejected this suggestion,

noting that it is not the function of federal courts to rewrite state law which conflicts with federal law, and citing *Homemakers, Inc. v. Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976). In so reconstructing the law, the Court would not only be engaging in a task properly assigned to the state legislature, but in this particular case it would also be extending to all employees a right to leave and reinstatement which the legislature had provided to only a single group of employees.

The "extension" argument is merely an attempt to have the courts "legislate" a disability benefit for non-pregnant employees where it has been neither mandated by state or federal law nor obtained through collective bargaining. Neither the California legislature nor Congress has required employers to grant extended disability leave with guaranteed reinstatement to all employees. California has required the benefit only for maternity leave. Title VII requires only equal treatment with respect to benefits, but does not require any leave. Neither statute was enacted to enable private plaintiffs' attorneys to leverage a limited state-imposed benefit into a federal entitlement for all employees covered by Title VII. This case, therefore, is unlike other "extension" cases where the federal legislature has provided specific benefits that the courts found to be underinclusive as to certain groups.[18]

---

[18] The examples of extension of a statute most frequently cited are those involving sex-based restrictions on benefits provided under *federal* statutes, such as the Social Security Act provision at issue in *Califano v. Westcott*, 443 U.S. 76 (1979). In that case, the parties agreed that extension was the appropriate remedy. Moreover, the Social Security Act

In those instances, the Court was able to discern that an extension of the statute—by elimination of some unconstitutional classification—produced a result which was more nearly in accord with the wishes of Congress than if the benefit had been eliminated altogether. In the instant case, there is no indication that the California legislature was intending to impose an across-the-board requirement for disability leave with guaranteed reinstatement, but that in so doing the legislature erred by wrongfully excluding all disabilities except pregnancy. Indeed, as the Ninth Circuit's opinion reflects, the intent behind the California pregnancy law was to grant special treatment to pregnant workers to assure that they would not be victims of discrimination. By invalidating the requirement for special treatment, this Court will be acting to assure equal treatment for pregnant workers, as required by the federal pregnancy discrimination law. This result surely is more in accord with the intent of the state legislature than would be the imposition of an across-the-board disability leave requirement by this Court.

Furthermore, the practical impact of an extension of this statute would not be a simple matter of adding to the list of individuals receiving benefits from a particular government agency. Rather, such an extension of the statute would have an impact on the disability leave policies in literally thousands of diverse workplaces. This alone indicates the wisdom

---

includes a strong severability clause. Such a clause invites the Court to delete an improper classification in one part of the statute. Indeed, the discussion of extension versus invalidation by Mr. Justice Harlan in his concurring opinion in *Welsh v. United States*, 398 U.S. 333, 344 (1970) occurs in the context of the very broad severability clause of the federal selective service law. *Id.* at 364-65.

of the Court's previous statements that the legislature, and not the judiciary, is the appropriate forum to decide whether or not employment benefit requirements should be expanded.

There are many practical questions which must be considered before imposing such a policy on all workers, not the least of which is whether employers and employees themselves would be well served by a policy of a four-month leave period for all disabilities. Also in need of consideration is whether one common leave policy would be practical for the wide variety of industries and occupations covered by the statute, and whether the same policy should be applied to small as well as large employers. Also, how would such a statute affect leave policies already implemented either by an individual employer or through collective bargaining which, while nondiscriminatory, may differ in certain details from the pregnancy leave requirement in the California law? Clearly, this case is quite unlike the situations where extension of the statute has been used as a judicial response to a discriminatory classification in a federal law.

In the instant case, where the statute at issue is a state law, and where, aside from the pregnancy-based classification, there is no residual policy to be maintained in effect, the proper course is for this Court to refrain from speculation about what alternative statutory scheme the state would prefer to adopt.[19] Rather, this Court needs simply to reverse

---

[19] See *Skinner v. Oklahoma*, 316 U.S. 535 (1942). As characterized by Mr. Justice Harlan in his concurring opinion in *Welsh*, this Court's decision in *Skinner*

> noted the alternative courses of extending the statute to cover the excluded class or not applying it to the wrongfully included group. The Court declined to speculate which alternative the State would prefer to adopt and simply reversed the judgment.

398 U.S. at 361 n.14.

the judgment of the Ninth Circuit and declare the California pregnancy law invalid.

CONCLUSION

For the above reasons, the California pregnancy law is inconsistent with federal equal employment opportunity law and should be declared invalid. The ruling of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
LORENCE L. KESSLER *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment
Advisory Council

* Counsel of Record

April 4, 1986

AMICUS CURIAE

BRIEF

(8)

No. 85-494

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Petitioners,

v.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICI CURIAE OF THE NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL BAR ASS'N, WOMEN LAWYERS' DIVISION, WASHINGTON AREA CHAPTER; NATIONAL WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT; AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF NEITHER PARTY

Of Counsel:

WENDY WEBSTER WILLIAMS
600 New Jersey Ave., N.W.
Washington, D.C. 20001

KAREN KEEGAN
2027 Massachusetts Ave., N.W.
Washington, D.C. 20036

SUSAN DELLER ROSS *
SARAH E. BURNS
JOAN S. MEIER
GEORGETOWN UNIVERSITY
LAW CENTER SEX
DISCRIMINATION CLINIC
605 G Street, N.W.
Washington, D.C. 20001
(202) 624-8071

* Counsel of Record for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE AND PARTY SUPPORTED	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. The Pregnancy Discrimination Act Does not Preempt the California Pregnancy Leave Legislation Because the Two Statutes Can Be Read as Imposing Mutual and Complementary Obligations Upon California Employers to Provide up to Four Months of Unpaid Leave to All Disabled Employees	4
II. This Court May Only Uphold the California Statute by Requiring That Employers Comply With Both It and the PDA by Providing an Unpaid Disability Leave to All Employees; if not so Reconciled, the California Law Is in Conflict With the PDA	11
III. If the State Law Is Not Reconciled With the PDA, Extension of Benefits to the Disfavored Sex, not Removal of Benefits From the Favored Sex, Is the Required Remedy in This Case	20
A. Title VII Requires Extension of Benefits, not Their Removal	20
B. This Court Should Extend the State Statute Because the California Legislature Has Indicated Its Intense Commitment to the Four-Month Leave Provision, Extension of Benefits Would Impose Virtually no Costs, and Invalidation Would Severely Disrupt State Policy	27
CONCLUSION	31

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 21
Barone v. Hackett and United States v. Rhode Island Dep't of Employment Security, *reported as one decision*, 602 F.Supp. 841 (D.R.I. 1984) 25, 26
Califano v. Westcott, 443 U.S. 76 (1979) 27
California Federal Savings & Loan Association v. Guerra, 758 F.2d 390 (9th Cir. 1985) 17, 18
California Federal Savings & Loan Association v. Guerra, Nos. 84-5843 & 84-5844 (9th Cir. Apr. 16, 1985) (separate unpublished opinion) 10
Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 21
Dothard v. Rawlinson, 433 U.S. 321 (1977) 20
Geduldig v. Aiello, 417 U.S. 484 (1974) 19
General Electric Co. v. Gilbert, 426 U.S. 125 (1976) 14, 17, 18, 23
Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972) 9, 10
Heckler v. Mathews, 465 U.S. 728 (1983) 27
Homemakers, Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976) 11
Kansas Association of Commerce & Industry v. EEOC, 33 EPD ¶ 34,180 (D.Kan. 1983) 25
Kelly v. Washington, 302 U.S. 1 (1937) 8
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 13
Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973) 8
Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry, 515 F. Supp. 1264 (D. Mont. 1981), *vacated*, 685 F.2d 1088 (9th Cir. 1982) 10
Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry, 692 P.2d 1243 (Mont. 1984), *appeal docketed*, No. 84-1545 (U.S. Mar. 27, 1985) .. 4, 10, 22, 26
Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) 4, 13, 18, 23, 26
Phillips v. Martin Marietta Co., 400 U.S. 542 (1971) 20

TABLE OF AUTHORITIES—Continued

Page

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 4, 5, 10
Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 8
United States v. Rhode Island Dep't of Employment Security, 619 F.Supp. 509 (D.R.I. 1985) 26
Welsh v. United States, 398 U.S. 333 (1970) 27

Statutes:

AB 1960, Cal. Assembly (1977) 14
Act of Mar. 23, 1979, ch. 13, §§ 1, 6, 1979 Cal. Stat. 35, 37, 39 17
Act of Sept. 21, 1980, ch. 992, § 4, 1980 Cal. Stat. 3138, 3140, 3151-53 ..... 15, 17
Act of Sept. 28, 1978, ch. 1321, § 4, 1978 Cal. Stat. 4319, 4322 ..... 2, 17
Act of Sept. 28, 1978, ch. 1321, 1978 Cal. Stat. 4319 *et seq.* (codified in part at Cal. Gov't Code § 12945 (West 1980)) 1
Cal. Gov't Code §§ 12926(c), 12943, 12945 (West 1980) ..... *passim*
Cal. Lab. Code §§ 1420.2(a), 1420.35 (1979) (recodified as Cal. Gov't Code §§ 12943, 12945(a) (West 1980)) 15, 17
Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1982) 9, 10, 21
Montana Maternity Leave Act, Mont. Code Ann. §§ 49-2-310 (1983) 10
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) ..... *passim*
Section One, 42 U.S.C. § 2000e(k) (1982) 1, 3
Section Three, 92 Stat. 2076, 2077 (1978) ..... *passim*
R.I. Gen. Laws, §§ 28-38-7, 28-48-8 (1979) 26
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1964) ..... *passim*
Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4 (1982) 5, 8, 9, 11

Legislative History:

123 Cong. Rec. (1977) 6, 8, 19, 22, 23
124 Cong. Rec. (1978) 6, 7, 8, 13

TABLE OF AUTHORITIES—Continued

Page

California Governor's Chaptered Bill File 6, 15, 28
California Senate Committee Bill File (Ind. Rel. Comm.) 14
H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978) ..*passim*
Report of Committee on Conference, Cal. Assembly Journal 18572 (Aug. 31, 1978) 16
S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) ....*passim*

Regulations:

29 C.F.R. § 1604.10, Questions & Answers 19, 20, 29 & 30 .....10, 23, 24, 25, 26

Miscellaneous:

Pamphlet, March Fong Fu, Secretary of State, Legislative Resource Materials in the California State Archives 6, 7
The Bureau of National Affairs, Inc., Personnel Policies Forum, *Policies on Leave from Work* (June 1983) 30, 31
Williams, W., *Equality's Riddle: Pregnancy & The Equal Treatment/Special Treatment Debate*, 8 N.Y.U. Rev. L. & Soc. Change 325 (1984-95)..... 7

BRIEF FOR THE NATIONAL ORGANIZATION FOR WOMEN, ET AL., AS AMICI CURIAE

This brief amici curiae is filed with the consent of the parties as provided for in this Court's Rules.

INTEREST OF AMICI CURIAE AND PARTY SUPPORTED

The statement of the Interest of Amici is included in the Appendix. This brief supports neither party.

SUMMARY OF ARGUMENT

In September 1978, the California legislature enacted legislation telling state employers what their obligations were to pregnant employees.[1] Just prior to final passage, the statute was significantly amended. By late August of 1978, the emerging law included seven provisions that limited employer obligations to pregnant workers compared to other workers and two that gave the pregnant affirmative rights. By then, however, it was apparent that federal legislation—the Pregnancy Discrimination Act (PDA)—was likely to be enacted into law. That (subsequently-enacted) federal legislation[2] was based on a model for the treatment of pregnancy that sharply conflicted with the state model. The state law treated pregnancy as *sui generis* and made provision for it without regard to the treatment of other workers; the federal legislation mandated equal treatment of pregnancy. The proposed federal legislation provided, in Section One (its substantive section), that discrimination on the basis of pregnancy constituted discrimination on the basis of sex and demonstrated how Congress intended the comparative analysis of pregnancy and other conditions to proceed:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the

[1] Act of Sept. 28, 1978, ch. 1321, 1978 Cal. Stat. 4319 *et seq.* (codified in part at Cal. Gov't Code § 12945 (West 1980)).

[2] The PDA was enacted on October 31, 1978. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified in part at 42 U.S.C. § 2000e(k) (1982)).

> basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. § 2000e(k) (1982).

Plainly, Congress had concluded that the *sui generis* approach to pregnancy was more likely to harm than to help pregnant workers.[3] The state, by contrast, had done exactly what Congress aimed to avoid by passage of the PDA. It had created policies treating pregnant workers as unique. It had thereby limited—at least as much as it expanded—their job-related opportunities and rights.

Faced with this obvious conflict, the state added its own preemption provision to the final version of the state legislation, prospectively invalidating all but one of the new California statutory provisions as applied to Title VII employers,[4] in the event that Congress should pass the PDA.[5] The section designated to survive passage of the PDA was the section at issue here, giving pregnant workers an unpaid leave of absence up to a maximum of four months (including accrued vacation leave) for the "period the female employee is disabled due to *pregnancy, childbirth, or related medical conditions.*" Cal. Gov't Code 12945(b)(2) (West 1980) (emphasis added).

---

[3] The Amici Brief of the American Civil Liberties Union *et al.*, filed herein, contains a detailed discussion, to which we subscribe, of the harmful effects of this approach.

[4] The statute was not marked for preemption as to employers too small to be governed by Title VII—those with five to fourteen employees. *Compare* 42 U.S.C. § 2000e(b) (1982) *with* Cal. Gov't Code § 12926(c) (West 1980). Thus, these employers are still authorized to treat pregnant workers worse in many respects than they treat other workers. *See infra* pp. 14-17.

[5] Act of Sept. 28, 1978, ch. 1321, § 4, 1978 Cal. Stat. 4319, 4322. The text of and a more detailed account of Section Four are set forth *infra* pp. 16-17 & note 27.

One month after passage of the California legislation, Congress did enact the PDA, and the California preemption provision became effective.[6] But the remaining California section providing unpaid disability leave for pregnancy-related conditions also clearly conflicts with Title VII's *per se* ban on classifications based on "pregnancy, childbirth, or related medical conditions," 42 U.S.C. 2000e(k), unless the conflict is avoided through construction of the two statutes to impose complementary obligations on California employers to provide the unpaid disability leave to all disabled employees. As we show below, this Court should avoid finding a conflict in order to preserve the important policies of both the PDA (that the pregnant and the nonpregnant be treated alike, without distinctions based on pregnancy, and that pregnant women not lose their jobs due to pregnancy-based discrimination) and the California statute (providing job security for pregnant women).

If, however, this Court does not interpret the two statutes as imposing complementary obligations on California employers to provide unpaid disability leave to all, then this Court must find that the state statute conflicts with Section One of the PDA, and that the remedy for that conflict, under Section Three of the PDA[7] and Title VII's general remedial principles, is not preemption and invalidation, but extension of the statute. This solution alone accords full deference to the intent of both Congress and the California state legislature.

Moreover, this solution alone is the one that would be provided were this a "right-side-up" Title VII case. For this case comes to the Court in an atypical, "upside down," Title VII procedural posture, which significantly distorted the remedial issue in the courts below. Although Title VII does not authorize *employers* to sue,

---

[6] *See infra* p. 17 & note 27.

[7] Section Three prohibits employers from reducing benefits provided to any employee "in order to come into compliance with this Act." Pub. L. No. 95-555, § 3, 92 Stat. 2076, 2077 (1978).

see 42 U.S.C. § 2000e-5, the California Federal Savings and Loan (Cal Fed) and two associations representing thousands of California employers have sued in federal court asserting, in essence, the Title VII rights of their nonpregnant, male employees not to be subject to discrimination.[8] Nonpregnant male employees representing themselves under Title VII because of this discrimination (as Title VII authorizes *them* to do), however, would be seeking extension to themselves of the more favorable treatment accorded pregnant workers, not elimination of that treatment for pregnant workers. *Cf. Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 (1983). We ask that this Court not mandate a different result than the male employees would be entitled to because some California employers have beaten the employees to the courthouse door.[9]

ARGUMENT

I. The Pregnancy Discrimination Act Does not Preempt the California Pregnancy Leave Legislation Because the Two Statutes Can Be Read as Imposing Mutual and Complementary Obligations Upon California Employers to Provide up to Four Months of Unpaid Leave to All Disabled Employees.

Where Congress has expressed its intent concerning preemption of state law, that intent controls. *Shaw v.*

[8] The employers' Complaint alleges that the employers will ". . . discriminate against disabled males if they [the employers] are compelled to comply with state law. . . ." Complaint, para. 27.

[9] A third way in which the issue posed by this suit could come to this Court is through a *state* court suit by a female worker seeking her right under state law to the unpaid leave, with the employer asserting Title VII as a defense to that suit. That is the context of *Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry*, 692 P.2d 1243 (Mont. 1984), *appeal docketed*, No. 84-1545 (U S. Mar. 27, 1985), presently pending in this Court. See our argument in the *Miller-Wohl* Brief Amici Curiae Concerning Jurisdictional Statement for ACLU *et al.* at Point III, that the employer had no valid defense to the state law violation because Section Three of the PDA required extension, not invalidation, of the state statute.

Delta Airlines, Inc., 463 U.S. 85, 95 (1983). In this case, the federal law in question explicitly indicates an intent to avoid preemption of state law if at all possible. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), provides:

> *Nothing in this subchapter shall be deemed to exempt or relieve any person from any* liability, *duty*, penalty, or punishment *provided by any* present or *future law of any state* or political subdivision of a state, *other than* any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter. (Emphasis added.)

42 U.S.C. § 2000e-7. Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4 (1982), further provides:

> *Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field* in which any such title operates *to the exclusion of state laws* on the same subject matter, *nor shall any provision of this Act be construed as invalidating any provision of state law unless* such provision is inconsistent with any of the purposes of this Act or any provision thereof. (Emphasis added.)

California law does not "require or permit" an "unlawful employment practice under Title VII", 42 U.S.C. 2000e-7, because nothing in the California statute prohibits employers from complying with Title VII by providing the unpaid disability leave to all employees.[10] Nor does the California provision appear "inconsistent with the purposes of Title VII" or with any of its provisions, 42 U.S.C. 2000h-4, when the underlying premises of the two statutes are examined and they are mutually so enforced. Indeed, the *purposes* of both statutes were similar—to protect pregnant workers against pervasive discrimination in the workplace, which had commonly re-

[10] The vast majority of employers already provide such unpaid leaves of absence for extended physical health problems. *See infra* pp. 29-31.

sulted in employers firing pregnant women and/or denying them wage replacement benefits, at the precise moment when such women most needed that job and income to support their expanding families. The Title VII legislative history is replete with references to this purpose.[11] The same is true of the California statute's legislative history.[12] However, the methods for achieving these

[11] *See, e.g.*, 123 Cong. Rec. 29,662 (1977) (statement of Senator Cranston) (". . . statistics show that 70 percent of women who work do so out of hard economic necessity. They are either their family's sole wage earner, are married to spouses who earn less than $7,000 per year, or are single. *Discrimination based on pregnancy makes it difficult for these women to remain in the labor force and to maintain the continuity of their family incomes*") (emphasis added); 124 Cong. Rec. 36,817 (1978) (Sen. Williams) (". . . this legislation will prohibit other employment policies which adversely affect pregnant workers. These policies include . . . termination of pregnant women . . . ."); 124 Cong. Rec. 36,818 (1978) (Sen. Javits) ("[w]ithout [the bill], women workers would face serious obstacles to continuing their pregnancy and maintaining their jobs at the same time. . . . [W]omen would be fired or stripped of seniority rights when they were in fact able to work. Women workers must not be made to bear such an unfair burden, especially since more than 60 percent of working women need to work to support their families."). *See also*, 123 Cong. Rec. 29,664 (1977) (Sen. Brooke); 124 Cong. Rec. 21,436 (1978) (Rep. Sarasin); 124 Cong. Rec. 21,441 (1978) (Rep. Collins); 124 Cong. Rec. 21,442 (1978) (Rep. Tsongas); and 124 Cong. Rec. 21,442 (1978) (Rep. Burke).

[12] *See* Governor's Chaptered Bill File: Enrolled Bill Rpt., Bill No. AB 1960, Dep't of Industrial Relations (Sept. 26, 1978), p. 3 ("This bill assures that women will have a job, after giving birth, so that they are assured of a means of support for themselves and their new offsprings"); Letter from Cal. State Council Service Employees International Union, AFL-CIO, to Governor Edmund G. Brown, Jr. (Sept. 21, 1978) ("In the past, we have found deficiencies in the law that preclude an adequate defense for pregnant females dismissed from their jobs"); Letter from California Commission on the Status of Women to Governor Edmund G. Brown, Jr. (Sept. 5, 1978) ("The bill will remedy discrepancies in treatment of men and women workers"). This legislative history is official and was acquired from the California State Archives, but is not published. *See* Pamphlet, March Fong Fu, Secretary of State, Legislative Resource Materials in the California State Archives. A copy of the Pamphlet and of the entire legislative history provided by the California State Archives has been lodged with the Court.

purposes were different—the federal legislation assuring that pregnant women be treated no worse or *better* than other workers, as the PDA legislative history demonstrates. For while most of that legislative history was devoted to a discussion of discrimination *against* pregnant women (because historically pregnancy and childbirth-based classification have been used primarily to harm pregnant workers),[13] Congress also addressed discrimination in *favor* of pregnant workers. The answer here was the same: federal law rejected such classifications and required that employee benefits granted to female workers must also be extended to male workers. Just before final passage of the bill, Senator Williams—the chief sponsor of the bill—informed the Senate, with regard to parenthood leaves provided solely for female workers:

> . . . I would like to emphasize that employers will not be required to discontinue programs which recognize, on a non-discriminatory basis, necessary adjustments which families must make in their living and working schedules on the arrival of new children in the family. Several employers have made inquiries to the committee regarding *the validity of voluntary maternity leaves, which permit women to take leaves of absence from work* for the purposes of preparing for and caring for their infants. . . .
>
> *The legislation would require only that the opportunity to take a parenthood leave* to meet the requirements of childcare during early infancy *be provided on a nondiscriminatory basis.* Thus, it would be equally as valid to permit a man to take a volun-

[13] *See generally* W. Williams, *Equality's Riddle: Pregnancy & The Equal Treatment/Special Treatment Debate*, 8 N.Y.U. Rev. L. & Soc. Change 325, 335 (1984-85).

> tary leave . . . as it would be to permit a woman . . . . (Emphasis added.)

124 Cong. Rec. 36,818 (1978)

Thus, recognizing the mutual and complementary obligations imposed on California employers by the joint operation of the California statute and of Title VII will not be "inconsistent with the purposes of Title VII." 42 U.S.C. 2000h-4. Rather, it will help achieve the compelling Congressional goals of protecting pregnant workers against workplace discrimination as Congress intended—by insuring that pregnancy-based classifications be eliminated from the workplace, that the disfavored sex be raised to the level of the favored sex in achieving this goal,[14] and that pregnant women be able "to remain in the labor force and to maintain the continuity of their family incomes." 123 Cong. Rec. 29,662 (1977) (Sen. Cranston). It will also help achieve California's equally compelling state goal of protecting pregnant workers from losing their jobs when they give birth.

Upholding the state statute while also mandating compliance with the PDA is also called for by general principles of federalism and preemption. This Court has recognized that a sensitive interrelationship exists between "statutes adopted by the separate, yet coordinate, federal and state sovereignties." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). Whenever possible, the Court should reconcile the two statutory schemes rather than "holding one completely ousted." *Id.* (citing *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). *See also Kelly v. Washington*, 302 U.S. 1, 10 (1937) (state legislation "is superseded only where the repugnance or conflict is 'so direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' ").

---

[14] *See infra* Point III.

The Eighth Circuit has applied these principles of avoiding preemption and respecting state sovereignty in another "upside-down" case presenting a virtually identical issue to the case at hand. *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972). There, a state statute required Arkansas employers to pay women (but not men) workers premium overtime pay rates. An Arkansas employer sued an Arkansas state official to invalidate the state law as conflicting with Title VII's prohibition on sex-based discrimination in compensation. The Court of Appeals concluded that:

> . . . *Congress expressly disclaimed any general preemptive intent in enacting Title VII*, and . . . the Arkansas statute can be held invalid only if it is in conflict with the Civil Rights Act. *See*, 42 U.S.C. §§ 2000e-7 and 2000h-4.
>
> Insofar as the Arkansas statute results in discrimination against men . . . conflict with Title VII can be avoided by requiring Potlatch to pay its male employees the same premium overtime rate which it is compelled to pay its female employees. . . .
>
> > "*The Arkansas statute does not say that women must be paid more than men; it simply says that they must be paid daily overtime without making a similar requirement as to men.* . . .
> >
> > "While Title VII of the Civil Rights Act was not passed to raise wages generally, it certainly does not 'impede' or 'frustrate' the purpose of the Act to require an Arkansas employer to eliminate discrimination by paying its male employees more than it would pay them ordinarily in order to equalize their pay with that of women.". . . .
>
> [T]his position is in accord with the express policies of the Equal Pay Act, 29 U.S.C. § 206(d)(1). (Emphasis added.)

Hays, 465 F.2d at 1082-83.

Here, too, the California provision does not say that pregnant women must be provided with more fringe benefits than men; it simply says that pregnant women must be given an unpaid disability leave without making a similar requirement for the non-pregnant disabled worker. Likewise, the express policies of the PDA (Section Three), as well as general Title VII remedial principles, require that employers may not come into compliance with the PDA by reducing any employee's fringe benefits; indeed, Section Three of the PDA was expressly modelled on the Equal Pay Act proviso quoted by the Eighth Circuit, *see infra* p. 21. Thus, the appropriate resolution of this case, as in *Hays*, was dismissal of the suit,[15] with a declaration that California employers who do not provide pregnant women with the disability leave

[15] The same reasoning has been applied in a virtually identical case. *Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry*, 515 F.Supp. 1264, 1267 (D. Mont. 1981). That court found that the Montana Maternity Leave Act (MMLA), Mont. Code Ann. §§ 49-2-310 (1983) ". . . does mandate that employers such as plaintiff grant a reasonable leave to employees who are disabled due to pregnancy. Plaintiff, however, can comply with both the MMLA and the Pregnancy Discrimination Act by amending its policy for its Montana stores to allow reasonable leaves of absence to *any* first year employees who miss work due to any sickness or disability. . . . *See* 29 C.F.R. § 1604.10, App. Q. and A.'s 19, 29 and 30 (1985)."

The Ninth Circuit subsequently vacated that decision, *not* on the merits but for lack of jurisdiction. 685 F.2d 1088, 1090 (9th Cir. 1982). The Ninth Circuit rejected that jurisdictional rationale in this case, based on *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96, n.14 (1983). *California Federal Savings & Loan Association v. Guerra*, Nos. 84-5843 & 84-5844, slip op. at 2 (9th Cir. Apr. 16, 1985).

After the federal *Miller-Wohl* suit was rejected by the Ninth Circuit, the Montana Supreme Court rejected the employer's Title VII defense on the ground that Title VII allowed the pregnancy-based classification at issue, but ruled that if it did not, the Montana state statute should be extended (citing *Hays, supra*). 692 P.2d 1243, 1254-55 (Mont. 1984). *See* Brief Amici Curiae Concerning Jurisdictional Statement for ACLU *et al.*, at 39-45, in *Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry*, 692 P.2d 1243 (Mont. 1984), *appeal docketed*, No. 84-1545 (U.S. Mar. 27, 1985).

may be sued by pregnant women under state law, and employers who do not provide other disabled workers with the same leave may be sued by disabled men under federal law.[16] This resolution does not require formal extension of the state statute, but merely recognizes the coexisting and complementary obligations imposed by state and federal law.[17] In sum, the California employers' suit to invalidate the California statute must be rejected, as they have not met the test set forth in the statutory provisions, 42 U.S.C. 2000e-7 and 2000h-4, allowing preemption only in the narrowest of circumstances.

II. This Court May Only Uphold the California Statute by Requiring That Employers Comply With Both It and the PDA by Providing an Unpaid Disability Leave to All Employees; if not so Reconciled, the California Law is in Conflict with the PDA.

While the goals of Title VII and the state statute overlap, the philosophies and approaches of the two statutes are diametrically opposed. The PDA requires that

> . . . women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same*

[16] Cal Fed's argument at pp. 12-15 of its Petition for Writ of Certiorari ignores the point that Title VII and the California law place obligations on *employers*, not on states. If, as here, state legislation is not preempted by federal law, then the employer is simply under the obligation to obey both federal and state law.

[17] See the views of the Justice Department to the same effect, in Memorandum for United States as Amicus Curiae, at 12, in support of granting the petition for certiorari (No. 74-1213) in *Homemakers, Inc. v. Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976). On essentially identical facts, *Homemakers* had rejected the Eighth Circuit's holding in *Hays*, but without acknowledgment of the Congressional disclaimer of any general preemptive intent in 42 U.S.C. 2000e-7 and 2000h-4. Justices White and Blackmun dissented from the denial of certiorari, on the ground that it was ". . . the Court's duty to resolve this disagreement which now impedes the important process of reconciling the federal statutes outlawing sex-based discrimination in employment with numerous "protective" state employment laws applicable only to female employees." 423 U.S. at 1063-64.

> for all employment-related purposes, *including receipt of benefits under fringe benefit programs*, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. § 2000e(k). The state statute provides that an employer may not

> . . . refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . . [t]o take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

Cal. Gov't Code § 12945(b)(2). Thus, even if the employer allows other disabled employees an unpaid leave of *less* than four months, the pregnant worker is entitled to four months; conversely, even if the employer allows others *more* than four months, the statute permits the employer to give the pregnant worker *only* four months. In contrast to the federal standard, the state standard mandates that disabled pregnant and non-pregnant workers be treated differently though they are "similar" in their "inability to work."

In enacting the PDA, however, Congress unequivocally and decisively rejected the premise that the disabled pregnant and nonpregnant could be treated differently because pregnancy is not comparable to other conditions. The Senate report stated:

> . . . the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions. Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work.

S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977) [hereinafter cited as S. Rep.]. The House report stated that the legislation was designed to ". . . mak[e] clear that distinctions based on pregnancy are *per se* violations

of Title VII. . . ." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 3 (1978) [hereinafter cited as H.R. Rep.]. And while most of the legislative history focused on the harm to pregnant women of pregnancy-based classifications, Senator Williams made clear that the *per se* ban on pregnancy distinctions applied equally in the rare situation where the pregnant worker received superior treatment (in the form of a pre-childbirth and post-childbirth parenthood leave). 124 Cong. Rec. 36,818 (1978). *See supra* pp. 7-8.

The Congressional intent to insure that pregnancy-based classifications be treated as *per se* violations of Title VII, and that pregnancy be treated as functionally comparable to other medical conditions was unambiguously reflected in the new definitional section to Title VII enacted by the PDA. *See supra* p. 2. The section *defines* pregnancy discrimination as sex discrimination, thus contemplating that, as in the case of sex discrimination in general, both discrimination against *and for* women constitutes a prima facie violation of the Act. Thus, if pregnant workers who are unable to work are given unpaid disability leave, so too must "other persons" who are "not so affected but similar in their . . . inability to work . . . ," and are therefore entitled to be "treated the same" as the disabled pregnant workers.[18]

---

[18] The fact that the functional comparability standard is written to reflect the historical fact that pregnant workers generally had been treated in an inferior way to other workers [". . . women . . . shall be treated the same . . . as other persons. . . ."] does not convert the standard into a one-way street benefitting only the pregnant. *See Newport News*, 462 U.S. at 679, where this Court ruled that the fact that ". . . congressional discussion focused on the needs of female members of the work force . . . does not create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment," and relied on *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), which held that a statute giving " '[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens,' " protected whites against discrimination on the basis of race even though the bill was designed to protect former slaves. 462 U.S. at 680, n.18.

The reason Congress rejected the *General Electric Co. v. Gilbert*, 426 U.S. 125 (1976) rationale was that viewing pregnancy as *sui generis* has historically resulted in widespread and serious harm to pregnant workers. The wisdom of the Congressional choice and the pitfalls of the *sui generis* approach to pregnancy are amply illustrated by the provisions and peculiar legislative history of the very statute at issue in this case.

The California provision, introduced by Assemblyman Berman in May 1977, as AB 1960, was originally intended to reverse this Court's decision in *Gilbert* at the state level. As first drafted, it simply extended a state law prohibiting pregnancy-based discrimination by school board employers to all California employers of five or more persons.[19] However, several employer groups opposed the measure and as a result, the statute was significantly amended. The statute that emerged from the legislature was fundamentally changed from a basic prohibition on pregnancy-based discrimination—much like the PDA—to legislation setting special and unique standards for the treatment of pregnant workers—precisely the approach rejected by the PDA. The statute now contained nine measures authorizing employers to treat pregnant workers differently than other workers, seven authorizing discrimination *against* pregnant workers, two authorizing discrimination in *favor* of pregnant workers. These measures included: (1) deletion of the original ban on pregnancy-based discrimination in hiring, so that employers could refuse to hire pregnant women on the basis of their pregnancy, even if they would hire other workers with upcoming disabilities (*e.g.*, a scheduled hernia or heart operation);[20] (2) a specific

[19] See the original version of AB 1960, provided by the California State Archives, and lodged with this Court. *See supra* note 12.

[20] Some employers had protested that they should not have to hire or train pregnant women. *See* Sen. Comm. Bill File (Ind. Rel. Comm.) (lodged with this Court): Letter from Cal. Seed Assoc. to Sen. Ind. Rel. Comm. (April 4, 1978); Memo to Sen. Ind. Rel. Comm. from Jose Hermocillo, Consultant (May 16, 1878); Letter from Kaiser Steel to Mr. Young, Ind. Rel. Comm. (April 5, 1978); Memo by Cal. Mfrs. Assoc. (April 4, 1978). The ban on hiring discrimination that was in the first version of AB 1960, *see* lodged copy of AB 1960, was then deleted. *See* Governor's Chaptered Bill File (lodged with this Court), Enrolled Bill Rpt., Bill No. AB 1960, Dep't. of Ind. Rel. (Sept. 26, 1978), p. 2 ("[T]his bill . . . was limited to pregnant employees (and not [pregnant] job applicants) in Senate Industrial Relations. . . ."). Thus, the California legislature meant to authorize employers to refuse to hire or train on the basis of pregnancy. *Compare* Cal. Lab. Code § 1420.2(a) (1979) *with* Cal. Lab. Code § 1420.35 (1979), subsequently recodified as Cal. Gov't Code §§ 12943 and 12945(a). Act of Sept. 21, 1980, ch. 992, § 4, 1980 Cal. Stat. 3138, 3140, 3151-53. All cites hereafter are to the Cal. Gov't Code.

proviso that employers could refuse to select pregnant women for training programs if the women would not finish the program three months prior to giving birth, even if similarly situated workers would be allowed into training programs, Cal. Gov't. Code § 12945(a); (3) a specific proviso limiting the amount of paid disability leave a pregnant worker could receive to six weeks even if other workers received more;[21] (4) another proviso exempting employers from providing health insurance benefits to pregnant workers which they provided to other workers;[22] (5) the provision at issue here giving disabled pregnant women an unpaid disability leave for up to four months even if no other workers received it; (6) language permitting the employer to include use of the employee's earned, accrued vacation time as part of the special unpaid disability leave;[23] (7) a proviso spe-

[21] ". . . [N]o employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth or related medical conditions for a period exceeding six weeks." Cal. Gov't. Code § 12945(b)(1).

[22] "Nothing in this section shall be construed to require an employer to provide his or her employees with health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions." Cal. Gov't. Code § 12945(b)(1).

[23] The statute attempts partially to mitigate the disadvantage of limiting pregnant women's paid disability leave to six weeks by allowing pregnant women to use accrued vacation leave for part of

cifically limiting the pregnant workers' use of unpaid leave to four months even where others are entitled to more;[24] (8) a proviso allowing employers to require pregnant workers taking the unpaid leave to give notice of the commencement and duration of the leave, when no such notice is imposed on others who may have predictable disabilities, Cal. Gov't Code § 12945(b)(2); and (9) a requirement that a pregnant worker be given special transfer rights "if she so requests" whether or not other disabled employees are entitled to transfers, Cal. Gov't Code § 12945(c)(2).

Thus, the bill emerging from the California legislature in late August 1978 was riddled with explicit pregnancy distinctions that would clearly be in conflict with the then-pending PDA.[25] Realizing the incompatibility of the state bill with the PDA, the final Conference Committee added the following section on August 31, 1978:[26]

---

the unpaid disability leave. Cal. Gov't. Code § 12945(b)(2). While this means that part of the unpaid leave becomes a paid leave, pregnant women, unlike workers with no six-week limit on paid disability leave, acquire paid leave at the expense of their vacations.

[24] The measure provides that employers may not refuse to allow women "[t]o take a leave on account of pregnancy for a reasonable period of time; *provided, such period shall not exceed four months.*" Cal. Gov't. Code § 12945(b)(2) (emphasis added). The average employer grants disabled employees *more* than four months leave (*see, infra* pp. 30-31); this provision thus guarantees pregnant workers *less* leave than the average worker obtains.

[25] The PDA's legislative history at that time already disapproved such measures. For example, Congress defeated a measure to put a special cap on disability benefits, *see infra* p. 19, and the House and Senate Committee Reports both emphasized that medical benefits must be equally provided to pregnant workers if they are provided to other workers, *see, e.g.*, S. Rep. *supra* p. 12, at 5; H.R. Rep. *supra* p. 13, at 5-6. See generally both Reports' discussions of the different employer practices that would fall under the PDA, including discrimination in hiring, in paid and unpaid disability benefits, and in special notice requirements.

[26] Report of Committee on Conference, Cal. Assembly Journal 18572 (Aug. 31, 1978).

> In the event Congress enacts legislation amending Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy, the provisions of this act, *except paragraph (2) of subdivision (b) of Section 1420.35 of the Labor Code*, shall be inapplicable to any employer subject to such federal law. . . . (Emphasis added.)

Act of Sept. 28, 1978, ch. 1321, § 4, 1978 Cal. Stat. 4319, 4322. When Congress subsequently enacted the PDA, this provision went into effect.[27] Although it invalidated the state law as applied to Title VII employers, it *preserved* all of the provisions cited above for employers not covered by Title VII (employers of more than five but fewer than 15 employees, *see supra* note 4), and continued to apply the leave provision at issue here to both Title VII employers and the smaller employers covered by state law.

As this example shows, Congress had a solid basis for fearing that the allowance of special pregnancy provisions would operate to the detriment of women workers. Far from being primarily a statute of special benefit to pregnant workers, the California statute—taken as a whole—harms them.

To uphold the California legislation at issue here by ruling that the PDA permits a special unpaid disability leave for pregnant women alone would undo the PDA by resurrecting the *Gilbert* rationale that pregnancy is *sui generis*, thus encouraging the reinstitution of pregnancy-based classifications expressly harmful to pregnant workers. That was the route taken by the Ninth Circuit, whose theory was nothing more than a recycled *Gilbert* rationale (albeit without acknowledgment of its source.)[28]

---

[27] The PDA was enacted on October 31, 1978, *see supra* note 2. California then changed § 4 to its current wording, *see* Act of Mar. 23, 1979, ch. 13, §§ 1, 6, 1979 Cal. Stat. 35, 37 and Act of Sept. 21, 1980, *supra* n.20 (codifying Cal. Lab. Code 1420.35(e) as Cal. Gov't Code § 12945(e)).

[28] The Court referred to Cal Fed's position as seeking "to measure equality of benefits by the sameness of coverage despite *differences in need.*" *California Federal Savings & Loan Association v. Guerra*, 758 F.2d 390, 393 (9th Cir. 1985). It then stated

Not surprisingly, the Ninth Circuit did not attempt to grapple with the overwhelmingly clear PDA legislative history against its position. It did not mention a single word from the authoritative Senate and House reports, quoted *supra* pp. 12-13, from Senator Williams' discussion of a closely similar policy, or from this Court's repeated and frank acknowledgements in *Newport News* that Congress had rejected the *Gilbert* rationale:

> Although *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, *because only women can become pregnant*, Congress has unequivocally rejected that reasoning.

462 U.S. at 684.[29] The Ninth Circuit's reasoning is nothing more than a variation of the rejected *Gilbert* proposition—the notion that singling out pregnancy-related benefits for *inclusion* is nondiscriminatory on its face because only women can become pregnant ("male employees . . . do not get pregnant," 758 F.2d at 393). The California legislation cannot be upheld on this resurrected *Gilbert* theory.

Finally, Congressional debate confirms that state laws embodying pregnancy-based classifications would invariably conflict with the PDA. Senators Williams, Javits, and Hatch debated the permissibility of pregnancy classifications in the context of state laws creating temporary disability insurance schemes. Senators Williams and

---

that. ". . . Cal. Fed claims that the adequate pregnancy leave discriminates against *male employees—who do not get pregnant . . .*," *id.*, and that "[e]quality in the disability context compares coverage to *actual need*, not coverage to *hypothetical identical needs*." 758 F.2d at 396 (emphasis added). In other words, the court ruled that disability caused by pregnancy is not comparable to other disabilities. In its eyes, a male has only a "hypothetical" need for disability leave, because he does "not get pregnant." The court disregarded the PDA's explicit requirement that work disabilities caused by pregnancy be compared to work disabilities arising from other causes. Thus, the "actual need" the PDA focuses on is that of employees who cannot work for *any* reason, whether childbirth, a heart attack, or cancer.

[29] *See also*, 462 U.S. at 670, 678, 679, 679 n.17, 681-82 n.21, 685.

Javits repeatedly insisted that special state law provisions limiting recovery for pregnancy-related disability to an arbitrary 8 weeks in comparison to longer coverage for other workers, would be in conflict with the PDA, including the statutes in their own home states of New Jersey and New York. *See* 123 Cong. Rec. 29,643, 29,653-55 (1977). Thus, for example, Senator Hatch stated that ". . . the State of New Jersey discriminates because they have an 8-week limitation . . . ." *Id.* at 29,653. Senator Williams responded, ". . . we have to look to see whether other disabilities are scheduled and, if they are not, I say that would be a discriminatory provision." *Id.* Later, Senator Javits responded similarly,

> I heard what the Senator said about New Jersey. I have no idea why the published policy of New Jersey or the practicalities of its own legislative enactments may have induced it to take this step, but I consider it quite inconsistent with the legislative purpose we are seeking to serve here and with the Federal law which we should have on the subject.

Id. at 29,654. Shortly thereafter, the Senate defeated Senator Hatch's proposed amendment limiting receipt of pregnancy-related disability benefits under the PDA to a six-week maximum. 123 Cong. Rec. 29,660 (1977).

Throughout this discussion, the clear implication was that state statutes inconsistent with the PDA would be extended to give pregnant women the same paid benefits other workers received, not invalidated. And Senator Hatch made that assumption explicit in discussing the California legislation at issue in *Geduldig v. Aiello*, 417 U.S. 484 (1974), under which pregnancy disability benefits had been excluded entirely rather than merely subjected to an arbitrary cap. He noted that "in disability programs such as that of the State of California, where employees contribute to the disability program, the added cost of *mandatory maternity-related coverage* will be passed on to all employees." *Id.* at 29,645 (emphasis added.)

Thus, this Court should follow the Congressional judgment that pregnancy-based classifications are *per se* violations of Title VII,[30] and rule that the California unpaid disability leave for pregnant women, standing alone, conflicts with the PDA. But as we show below and as Senator Hatch's remark suggested, the proper remedy for this conflict is not the invalidation of the state statute, but its extension to the excluded class.

III. If the State Law Is Not Reconciled With the PDA, Extension of Benefits to the Disfavored Sex, not Removal of Benefits from the Favored Sex, Is the Required Remedy in This Case.

A. *Title VII Requires Extension of Benefits, not Their Removal.*

1. One month after enactment of the California legislation at issue here, Congress enacted the PDA.[31] Section Three of the PDA, *supra* note 7, provides:

> [N]o person who, on the date of enactment of this Act is providing . . . benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee. . . .

Rather than provide California's statutory unpaid disability leave to all employees—a policy that would comply with Title VII—the California employers who brought this suit seek to avoid a state-imposed obligation to provide the leave to the pregnant. They thus seek "to reduce the benefits . . . provided" to pregnant employees—precisely what Section Three forbids.

The Congressional intent in passing this provision is clear. The remedial purpose of Title VII generally is to

[30] Of course, it is open to any employer to seek to justify a pregnancy-based hiring classification under Title VII on the ground that nonpregnancy (or pregnancy) is a bona fide occupational qualification under 42 U.S.C. § 2000e-2(e). *See Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

[31] *See supra* notes 1 and 2.

improve the economic well-being of those who have been discriminated against. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (requiring make-whole relief for victims of discrimination). The employers' remedial suggestion is take-away relief for beneficiaries. This turns Title VII on its head, exempting employers who discriminate from providing relief, rather than according relief to employees which Congress intended for them.

This remedial intent to aid victims of discrimination was expressed in the Senate Report:

> The prohibition against reducing benefits in section 3 is by no means novel. The Equal Pay Act of 1963 contains a similar provision which prohibits reductions in compensation in order to comply with its provisions.
>
> As Representative Dwyer remarked at the hearings on that bill, the objective of equal rights legislation 'is not to drag down men workers to the . . . levels of women, but to raise women to the levels enjoyed by men.' As the Supreme Court has observed in a case construing the Equal Pay Act, 'To require that depressed wages be *raised* [is] . . . a matter of simple justice to the employees.' (*Corning Glass Works v. Brennan*, 417 U.S. 188, 207 (emphasis supplied)). These principles apply equally to this bill.

S. Rep. *supra* p. 12, at 8. *See also* H. R. Rep *supra* p. 13, at 9.

It is true that Section Three of the PDA—unlike the Equal Pay proviso[32]—is specifically limited to a period of one year after enactment of the PDA. However, Congress cautioned that employers who did *not* comply with Section Three in the first year could not thereafter rely on the elapsing of the one-year period to exempt themselves from raising the benefits of the disfavored to the level of the favored sex. Thus, the Senate Report stated:

[32] That provision states that "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1) (1982).

> It should be noted, in this light, that the time limits in section 3 cover good-faith employers who come into compliance with the bill once it becomes law; *these time limits must not be construed as permission for employers who do not comply immediately to reduce benefits once the time limits have run.* (Emphasis added.)

S. Rep. *supra* p. 12, at 8. *See also H.R. Rep. supra* p. 13 at 9.

The reason for this caution was simple. The one-year period was intended to provide a transition during which employers would be required to provide all employees the same higher level of benefits. Senator Williams explained that "these time periods [would] provide all affected parties with an opportunity to gain experience with the actual impact of the legislation." 123 Cong. Rec. 29,386 (1977). Congress expected that experience would show the added costs of raising benefits to be minimal, and thus, a general reduction in benefits after one year would be unwarranted.[33] Congress envisioned this effect for *paid* medical or wage replacement benefits; *a fortiori*, it applies to the far less costly provision of *unpaid* leaves.[34]

2. Even if Congress had not enacted Section Three of the PDA, normal Title VII remedial principles would

---

[33] "These periods were prescribed on the assumption that, after employers have come into compliance and been in compliance for some time, it is very unlikely that changes in fringe benefit packages would be made because of the need to provide equal benefits for pregnant women." 123 Cong. Rec. 29,386 (1977) (remarks of Sen. Williams).

[34] The U.S. Department of Justice in its amicus brief to this Court in *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry*, 692 P.2d 1243 (Mont. 1984), *appeal docketed*, No. 84-1545 (U.S. Mar. 27, 1985), suggests at p. 13, n.5, that Section Three does not apply if the employer is not providing the higher level of benefits to the pregnant in violation of state law. Congress could not have intended to permit employers to avoid Section Three by violating state law. *See Miller-Wohl* Brief Amici Curiae Concerning Jurisdictional Statement for ACLU, *et al.*, at 36.

require extension of benefits to the disfavored sex, as the Senate Report on the PDA pointed out. Discussing Section Three's time limits, the Committee stated that they do not

> limit the remedial discretion of courts when cases are brought alleging noncompliance with section 1 as incorporated in title VII after the bill is effective. Rather, *ordinary title VII remedial principles then would apply.* In all of the pre-*Gilbert* pregnancy cases, for example, *this always meant requiring the employer to pay the women discriminated against more, rather than paying the other employees less.* (Emphasis added.)

S. Rep. *supra* p. 12, at 8. *See also* H. R. Rep. *supra* p. 13, at 5. Thus, Congress clearly contemplated that if members of the disfavored sex (here, disabled male employees) were to sue, normal Title VII remedial principles would require extension of benefits to them, quite independently of Section Three. This Court recognized that proposition in *Newport News* by ruling that under general Title VII principles male employees were entitled to the all-inclusive spousal health benefits that female employees received. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

There are no indications in the PDA's legislative history that merely because the special treatment of one sex is mandated by state law, different Title VII results should ensue. Indeed, in the sole reference made to the remedial implications of the PDA for a discriminatory state law, Senator Hatch assumed that expensive *paid* state disability benefits would be *extended* to pregnant workers to ensure "mandatory maternity-related coverage." 123 Cong. Rec. 29,645 (1977). Clearly, it never occurred to Senator Hatch that the California legislation would be invalidated altogether—the California employers' position here—thus taking away disability benefits from all who received them.

The EEOC's contemporaneous guidelines on the PDA, following the Congressional lead, took the same position

on the issue of discriminatory state law provisions. In Question and Answer 19 of its "Questions and Answers on the Pregnancy Discrimination Act," the Commission ruled:

> [A]*ny restrictions imposed by state law on benefits for pregnancy-related disabilities*, but not for other disabilities, *do not excuse the employer from treating the individuals in both groups of employees the same.* If, for example, a state law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees. (Emphasis added.)

29 C.F.R. § 1604, App. (1985). Similarly, the EEOC ruled that state or local governments providing their employees with income maintenance benefits for disabilities or with health insurance benefits may not provide a different lower level of benefits for pregnancy-related conditions. *Id.* at Q. & A. 20.

Nor does the remedial requirement of extension of benefits to the disadvantaged sex change simply because the sex discriminated against is male, as Senator Williams suggested in discussing the extension of parenthood leaves to men, *see supra* pp. 7-8, and as this Court held in *Newport News*. Moreover, although discrimination in *favor* of pregnant workers is relatively rare, the EEOC's guidelines require extension in two such situations. In Q. and A. 29, the Commission ruled as to employer insurance plans which paid

> benefits after the insured's employment has ended . . . for costs connected with pregnancy and delivery where conception occurred while the insured was working for the employer, but not for the costs of any other medical condition which began prior to termination of employment. . . .

29 C.F.R. § 1604, App. (1985). The Commission's solution:

> [A]n employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

See also id., Q. and A. 30.[35]

These EEOC rules, consistent with Congressional intent, answer the California employers' contention that the remedy for the conflict between the California unpaid leave statute and the PDA is to nullify the California statute. *Paid* disability leave statutes with pregnancy distinctions are not nullified, nor should unpaid leave statutes be; and extension of benefits to the disfavored sex is appropriate whether the discriminated against are the pregnant or the non-pregnant.

Finally, the Justice Department, like the EEOC, recognized the remedial extension principle in another case posing a PDA-state law conflict. Significantly, that recognition occurred in the context of two lawsuits which, in contrast to this one, were brought by employees and the United States, respectively, to seek extension of state benefits to the discriminated against class. *Barone v. Hackett*, and *United States v. Rhode Island Dep't of Employment Security*, both reported as one decision, 602 F.Supp. 481 (D.R.I. 1984).[36] For almost three years after passage of the PDA, the Rhode Island legislature failed to amend its paid temporary disability statute to give pregnant workers the same benefits other workers received.[37] Millions of dollars in back pay were owed

---

[35] Q. and A.'s 29 and 30 were subsequently approved by a federal district court which rejected an employer's attempt to have them invalidated. *See Kansas Association of Commerce & Industry v. EEOC*, 33 EPD ¶ 34,180 (D.Kan. 1983).

[36] The issue could have been presented as it is here had the defendants there chosen to bring the kind of action for injunctive and declaratory relief to nullify the state statute that the California employers here filed in federal court.

[37] Pregnant women received a lump sum of $250 until May 14, 1980, and of $500 from then until August 1, 1981, while the non-

pregnant workers in the state. Despite the heavy cost of extension of benefits, the Justice Department sued the state agency enforcing the disability statute under Section 707 of Title VII, 42 U.S.C. 2000e-6, seeking extension of benefits to the pregnant workers under the state statute.[38] The district court agreed with the Justice Department's position. After specifically referring to Senator Hatch's views on mandatory extension, *see supra* p. 19, the court rejected the defendants' argument that "the plaintiff class may not recover damages," 602 F.2d at 483, found defendants "liable under Title VII for treating pregnancy differently than other disabilities under the state TDI program," *id.* at 484, and subsequently ordered an award of back pay. *United States v. Rhode Island Dep't of Employment Security*, 619 F.Supp. 509 (D.R.I. 1985). The state did not appeal.

3. In sum, all available evidence—Section Three of the PDA, its legislative history, established Title VII remedial principles, EEOC guidelines, the Justice Department's litigated position on PDA-state law conflicts and a federal court decision closely on point—suggest that extension of benefits is the appropriate remedy under Title VII for the conflict to which the California employers point. This is the relief the male workers

---

pregnant received benefits under a percentage of wage formula for a maximum benefit period of 26 weeks. *Barone*, 602 F.Supp. at 482. *Compare* R.I. Gen. Laws §§ 28-41-8 (1979) *with* § 28-41-7 (1979).

[38] That suit was the first suit filed by the Justice Department under the PDA, and was brought by Assistant Attorney General for Civil Rights, William Bradford Reynolds. *See* United States Complaint, a copy of which has been lodged with the Court. Inexplicably, the Justice Department now appears to have reversed its position on extension. *See* Brief for the United States as Amicus Curiae at 10-11, *Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry*, 692 P.2d 1243 (Mont. 1984), *appeal docketed*, No. 84-1545 (U.S. Mar. 27, 1985). But see its suggestion that the case be remanded for consideration of extension as a remedy by the state court. *Id.* at 11.

would seek under Title VII.[39] It should not be denied because of the accident that, in this case, employers have (falsely) claimed to act in the interest of those men.

B. *This Court Should Extend the State Statute Because the California Legislature Has Indicated Its Intense Commitment to the Four-Month Leave Provision, Extension of Benefits Would Impose Virtually no Costs, and Invalidation Would Severely Disrupt State Policy.*

This Court has noted that when a statute which confers a benefit on one group is found to be underinclusive,

> there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.

Califano v. Westcott, 443 U.S. 76, 89 (1979), and *Heckler v. Mathews*, 465 U.S. 728, 738 (1983), *quoting Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). Justice Harlan in *Welsh* articulated the following test for determining whether extension or invalidation is appropriate:

> In exercising the broad discretion conferred by a severability clause it is . . . necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.

Id. at 365 (citations omitted). Under this test, too, extension of benefits is required.

---

[39] Employees could sue employers in any situation where the employer complied with state law, but not Title VII, by providing benefits to the pregnant, but not to the non-pregnant. The California employers who brought this suit did not allege how their employer members had responded to the requirements of California and federal law, but did allege that they represented close to 7000 employers, Complaint, paras. 2, 4.

California's intense commitment to the four month disability leave provision for pregnant workers is explicitly revealed by the peculiar legislative history of the California statutory provision at issue. *See supra* pp. 14-17. The California legislature understood its legislation would conflict with the PDA, because of the myriad pregnancy-based classifications constituting *per se* sex discrimination under the federal law. The legislature therefore adopted its own preemption provision, invalidating eight out of the nine special treatment measures should the PDA pass.[40] The legislature did *not* mark for preemption the pregnancy-based provision at issue in this case, which dramatically demonstrates the state legislature's commitment to the residual policy here—the four-month leave policy. Clearly, it knew that the pregnancy-based classification it used risked being found in conflict with the PDA, and indicated that it wished to preserve this one provision at all costs.[41] In these circumstances, extension honors the strong state legislative commitment to the policy.

This conclusion is strengthened by comparing the disruption to the state statutory scheme caused by extension to that caused by invalidation. In this context, extension is not in fact onerous. The vast majority of employers already provide the very benefit required by the statute to all. This reality explains an apparent para-

[40] *See supra* p. 17, and Governor's Chaptered Bill File, *supra* note 12 (lodged with this Court), Memorandum of Dep't of Industrial Relations to Howard Berman, dated September 14, 1978, entitled "AB 1960; veto or sign?," at 1, *"The main objection to the signing of AB 1960 is § 4, the federal preemption of state legislation as to employers covered by federal legislation, should the federal bill pass (except for State enforcement of the four-months time for a pregnancy leave with an automatic right to return to the job)."* (Emphasis in original.)

[41] It cannot be assumed that the state thought the provision did not conflict with the PDA because it *benefitted* pregnant women rather than hurting them. One other "beneficial" provision—that giving pregnant women special transfer rights—was also marked for preemption. *See* Cal. Gov't Code § 12945(c)(2).

dox of the case—that proponents of the state legislation consistently referred to the special pregnancy leave provision as necessary if pregnant women were to receive *equal treatment*. *See supra* note 12. If legislators and supporters believed that employers gave everyone *but* pregnant workers unpaid leaves of absence when they were medically unable to work, then enacting the pregnancy leave provision would merely fill in a discriminatory gap in existing employer policy that gravely injured pregnant workers—causing them to lose their jobs just when they needed them most. Similarly, if this Court were formally to announce that extension is the appropriate remedy, it would require no more than the legislature thought it provided in the first place.

The legislature's assumption concerning the existence of unpaid leave of absence policies is supported by examination of the Complaint in this case. Significantly, the 7000 employers involved in this action do not allege that a single employer among them has no unpaid leave of absence for disabled workers. Instead, they allege that only two minor provisions among "certain" of their employer policies deviate from the requirements of the statutory four-month policy: (1) "certain of these leave policies/programs do not provide for an *immediate* reinstatement right to a pregnant female at the conclusion of her disability leave," (emphasis added),[42] Complaint, para. 22, and (2) "that certain of these policies/programs provide that employees are not entitled to disability leaves, until the employee has completed a probationary period." *Id.* It appears from the Complaint, then, that many California employers comply with both the California statute and the PDA, and that full compliance with the state statute will cause only minor

[42] This suggests not that *no* leave is available, but that the worker might have to wait somewhat before returning to work, as was the case with Ms. Garland. The burden on employers of adjusting their leave policies to reinstate disabled employees within the statutory four months is minimal.

changes in unpaid leave policies for those who do not now do so.[43]

National statistics, too, fully support the California legislature's assumption. More than ninety percent (90%) of the firms surveyed in a 1983 BNA report on personnel policies have provisions for unpaid leaves of absence. Ninety-seven percent (97%) of the firms provide such leaves of absence to plant and service workers, 96% provide unpaid leave to office and clerical workers, and 94% provide unpaid leaves of absence to management and exempt employees. The Bureau of National Affairs, Inc., Personnel Policies Forum, *Policies on Leave From Work* 3, Table 1 (June 1983) (hereinafter BNA Report). Further, the most common reason for granting an unpaid leave of absence is an employee's extended physical health problems, the very purpose contemplated by the California statute. *Id.* at 35. Close to 80% of firms responding for each employee group allowed leave for this reason, with nearly as high a proportion permitting unpaid leaves for alcohol or drug abuse rehabilitation, or mental health problems. *Id.* at 34, Table 16.

Moreover, the vast majority of firms permit unpaid leave in excess of four months. Sixty-nine percent (69%) of the companies permitted plant and service workers unpaid leaves of absence of at least 5 months, 81% permitted leave of at least 3-4 months.[44] BNA Report at 36, Table 17. Further, 70% of the firms surveyed assured their plant and service employees of the same or comparable position upon return. *Id.*

---

[43] Even in these few instances, Cal. Gov't Code § 12945 has a bona fide occupational qualification exception, applying to subsection (b) (2) as to all other subsections, which may excuse some employers from complying with the statute.

[44] The breakdown for the 69%, by length of time, was: no maximum limit—18%, 6 months—20%, 8 to 9 months—2%, 12 months—20%, and 15-30 months—9%. An additional 12% provided leave of 3-4 months.

For employers of office and clerical workers, 68% of the companies granted unpaid leave in excess of 5 months and the same percentage guaranteed these workers the same or comparable position upon return. BNA Report at 37, Table 18. Eighty-one percent (81%) of the firms permitted office and clerical workers an unpaid leave of at least 3-4 months. *Id.* Similarly, for management and exempt employees, 68% of the companies provide leave of 6 months and more, and 80% permit leave of at least 3-4 months. BNA Report at 38, Table 19. Seventy-one percent (71%) of the companies guarantee their management and exempt employees the same or comparable job upon return. *Id.*

These statistics underscore the limited effect extension would have on state employers. Far from disrupting the California legislative scheme, extension would simply give official recognition to an essential premise of that scheme—that employers already provided to other employees the benefits that the legislature officially conferred upon pregnant workers in order to equalize the position of those workers.

Invalidation, on the other hand, would tear California legislative policy up by the roots. Pregnant workers would lose a valuable protection they now have and which the California legislature intended them to have. This protection is crucial, serving as it does to protect a woman's right to earn a livelihood just when she has a new child to support. It must not be taken away by invalidation of the statute.

CONCLUSION

For the reasons stated above, this Court should vacate the opinion of the Ninth Circuit, and rule that employers must comply with both the state law and the PDA, by providing an unpaid leave of absence to all disabled workers. Absent this construction, the Court should vacate the judgment and rule that the state law conflicts with the PDA, and that, pursuant to Title VII, it must be extended to cover the non-pregnant disabled employee.

Respectfully submitted,

Of Counsel:

WENDY WEBSTER WILLIAMS
600 New Jersey Ave., N.W.
Washington, D.C. 20001

KAREN KEEGAN
2027 Massachusetts Ave., N.W.
Washington, D.C. 20036

SUSAN DELLER ROSS *
SARAH E. BURNS
JOAN S. MEIER
GEORGETOWN UNIVERSITY
LAW CENTER SEX
DISCRIMINATION CLINIC
605 G Street, N.W.
Washington, D.C. 20001
(202) 624-8071

* Counsel of Record for Amici Curiae

* Thanks are extended to Georgetown University Law Center students Jenelle Prins-Stairs and Elizabeth Abdoo for their help in preparing this brief.

APPENDIX

INTEREST OF AMICI CURIAE

This brief amici curiae is submitted on behalf of the National Organization for Women (NOW), the NOW Legal Defense and Education Fund, the National Bar Association (Women Lawyers' Division, Greater Washington Area Chapter), the National Women's Law Center, Women's Law Project, and Women's Legal Defense Fund.[1] These organizations were leaders in the successful effort to amend Title VII of the 1964 Civil Rights Act through the Pregnancy Discrimination Act of 1978 (the PDA), and have represented women with claims of pregnancy-based discrimination. Amici believe that the decision below has the potential for causing great harm to enforcement of the PDA. This brief *amici curiae* is filed in support of neither party.

The National Organization for Women ("NOW") is a membership organization of approximately 150,000 women and men in about 900 chapters throughout the United States dedicated to bringing women into full participation in American society and assuring equal employment opportunities for women. NOW is frequently contacted by and asked to assist women who have been subjected to sex discrimination, including discrimination based on pregnancy.

The NOW Legal Defense and Education Fund ("NOW LDEF") was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The National Bar Association, Women Lawyers Division, founded in 1925, is a professional membership organization which represents more than 10,000 Black attorneys, judges and law students. Its purposes include protecting the civil and political rights of all citizens. The NBA, through its Women Lawyers Division, has been actively involved in issues concerning equal employment opportunity. The Greater Washington Area Chapter is particularly dedicated to addressing the needs of women in the Washington, D.C. metropolitan area.

The National Women's Law Center is a non-profit organization founded in 1972 as the Women's Rights Project of the Center for Law and Social Policy. The Center, an independent organization since 1981, provides legal representation before federal administrative agencies and courts to protect and advance women's rights. It engages in a broad range of legal activities including litigation, advocacy before government agencies, public education and research. The Center has placed a particular emphasis on addressing problems of sex discrimination in employment and in education, including, in particular, discrimination on the basis of pregnancy.

Women's Law Project is a non-profit law firm dedicated to advancing the status of women through litigation and public education. Founded in 1973, the Women's Law Project has conducted major litigation on behalf of women in the areas of reproductive freedom, family law, discrimination in employment, credit and insurance, and the rights of female prisoners.

The Women's Legal Defense Fund is a non-profit, tax exempt membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment through litigation of significant employment discrimination cases, through the operation of an employment discrimination counseling program, and through agency advocacy before the EEOC

and other federal agencies charged with enforcement of the equal opportunity laws. It has had particular interest in the implementation of the Pregnancy Discrimination Act, which it worked to pass in 1978 and whose enforcement it has since monitored through its Pregnancy Rights Monitoring Project.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

CALIFORNIA FEDERAL SAVINGS
AND LOAN ASSOCIATION, et al.,
Petitioners,

vs.

MARK GUERRA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF COALITION FOR REPRODUCTIVE EQUALITY IN THE WORKPLACE: BETTY FRIEDAN; INTERNATIONAL LADIES' GARMENT WORKER'S UNION, AFL-CIO; 9 TO 5, NATIONAL ASSOCIATION OF WORKING WOMEN; PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

(Continued within);

IN SUPPORT OF RESPONDENTS

Of Counsel:
JUDITH RESNIK
USC Law Center
ROBIN D. WIENER
Center for Law in the Public Interest
SHERYL GORDON McCLOUD

CHRISTINE ANNE LITTLETON*
UCLA School of Law
405 Hilgard Avenue
Los Angeles, California 90024
(213) 206-1245

Counsel of Record for Amici Curiae

Lawyers Brief Service / Legal Publishers / (213) 383-4457

ADDITIONAL AMICI:

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 36; CALIFORNIA FEDERATION OF TEACHERS; COALITION OF LABOR UNION WOMEN, LOS ANGELES CHAPTER; UNION OF FOOD AND COMMERCIAL WORKERS, LOCAL 770; UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL 132; ORANGE COUNTY CENTRAL LABOR COUNCIL; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, CALIFORNIA STATE DIVISION; WOMEN FOR; LOS ANGELES CITY COMMISSION ON THE STATUS OF WOMEN; COMISION FEMENIL DE LOS ANGELES; AMERICAN JEWISH CONGRESS-PACIFIC SOUTHWEST REGION; MEXICAN AMERICAN BAR ASSOCIATION OF LOS ANGELES COUNTY; HISPANIC WOMEN'S COUNCIL; LAWYERS CLUB OF SAN DIEGO; WOMEN LAWYERS OF ALAMEDA COUNTY; WOMEN LAWYERS OF SAN LUIS OBISPO COUNTY; INLAND COUNTIES WOMEN AT LAW; QUEEN'S BENCH; LOS ANGELES FEMINIST LEGAL SCHOLARS; DOLORES HUERTA; YVONNE B. BURKE; RABBI LAURA GELLER; DR. VERNA B. DAUTERIVE; RAMONA RIPSTON; CONGRESSMAN HOWARD L. BERMAN; STATE SENATOR DIANE E. WATSON; ASSEMBLYWOMAN TERESA P. HUGHES; ASSEMBLYWOMAN GLORIA MOLINA; ASSEMBLYWOMAN GWEN MOORE; ASSEMBLYWOMAN MAXINE WATERS; GAYLE BINION; MARY ELLEN GALE; CHRISTINE ANNE LITTLETON; CARRIE MENKEL-MEADOW; JUDITH RESNIK.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
SUMMARY OF ARGUMENT	2
ARGUMENT...	6
I. CALIFORNIA'S PREGNANCY DISABILITY LEAVE STATUTE REMEDIES THE DISCRIMINATORY BURDEN THAT INADEQUATE LEAVE POLICIES PLACE ON WORKING WOMEN'S RIGHT OF PROCREATIVE CHOICE	6
A. Procreative Choice Is A Fundamental Right Which Includes The Right To Carry A Pregnancy To Term	8
B. Inadequate Leave Policies Discriminatorily Affect Female Employees In The Exercise Of Their Right Of Procreative Choice	10
C. The California Statute Requires That Employers Adjust Leave Policies That Have A Discriminatory Effect On Female Employees' Right Of Procreative Choice	14

D. The California Statute Is Neither Over- Nor Under-Inclusive, Is Not Restrictive "Protective" Legislation, And Does Not Authorize Discriminatory Treatment Of Male Employees 15

1. The Statute Affects Only The Discriminatory Aspects of Leave Policies 15

2. The Statute Is Not "Protective" Legislation And Does Not Affect The Rights of Male Employees 19

II. THE CALIFORNIA STATUTE IS CONSISTENT WITH, LAWFUL UNDER, AND SUPPLEMENTAL TO TITLE VII, BECAUSE IT PROVIDES AN ADDITIONAL REMEDY AGAINST SEX DISCRIMINATION 23

A. Title VII Preempts Only State Laws That Are Inconsistent With The Purposes Of, Or Unlawful Under, Title VII 24

B. The California Statute Is Consistent With, and Lawful Under, Title VII 29

1. The Statute Does Not Competitively Advantage Or Disadvantage Any Group Of Employees..... 32

2. The Statute Does Not Prohibit Or Discourage More Generous Non-Discriminatory Leave Policies 33

3. The Statute Enhances The Equality Of Working Men And Women ... 35

C. Title VII And The California Statute Both Remedy Sex Discrimination Arising From Facially Neutral Policies That Have A Discriminatory Impact On Working Women. 38

D. The Pregnancy Discrimination Act Did Not Create Any Inconsistency Between Title VII And The California Statute 45

CONCLUSION 50

APPENDIX INTEREST OF AMICI CURIAE

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 26

Bradwell v. Illinois,
83 U.S. (16 Wall.) 130 (1873).....20

Carey v. Population Services International,
431 U.S. 678 (1977).....8,9

Carroll v. Talman Federal Savings & Loan Ass'n,
604 F.2d 1028
(7th Cir. 1979), cert. denied,
445 U.S. 929 (1980).....41

Cleveland Board of Education v. LaFleur,
414 U.S. 632 (1974).....2,8,10,11

Colorado Anti-Discrimination Commission v. Continental Airlines,
372 U.S. 714 (1963).....25,27

De Canas v. Bica,
424 U.S. 351 (1976).....25,27

Dothard v. Rawlinson,
433 U.S. 321 (1977).....39

EEOC v. Trailways, Inc.,
530 F. Supp. 54 (D. Colo. 1981)...42

General Electric Co. v. Gilbert,
426 U.S. 125 (1976).....12

Gerdom v. Continental Airlines,
692 F.2d 602 (9th Cir. 1982),
cert. denied, 460 U.S. 1074
(1983).....40,41

Goesaert v. Cleary,
335 U.S. 464 (1948).....20

Griggs v. Duke Power Co.,
401 U.S. 424 (1971).....38,39

La Riviere v. EEOC,
682 F.2d 1275
(9th Cir. 1982).....46

Metropolitan Life Insurance Co. v. Massachusetts,
471 U.S. _____,
105 S. Ct. 2380 (1985).....25,27

Nashville Gas Co. v. Satty,
434 U.S. 136 (1977).....12

Newport News Shipbuilding & Dry Dock Co. v. EEOC,
462 U.S. 669 (1983).....22

New York Gaslight Club, Inc. v. Carey,
447 U.S. 54 (1980).....5,26

Planned Parenthood v. Danforth,
428 U.S. 52 (1976).....9

Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978).....4,25

Regents of the University of
California v. Bakke,
438 U.S. 265 (1978).....46

Rice v. Santa Fe Elevator Corp,
331 U.S. 218 (1947).....25

Richardson v. Quik Trip Corp.,
591 F. Supp. 1151
(S.D. Iowa 1984).....42

Roe v. Wade,
410 U.S. 113 (1973).....9

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983).....4,26

Skinner v. Oklahoma,
316 U.S. 535 (1942).....2,8

Stanley v. Illinois,
405 U.S. 645 (1972).....8,16

United Steelworkers v. Weber,
443 U.S. 193 (1979).....29,30,46

Woods v. Safeway Stores, Inc.,
420 F. Supp. 35
(E.D. Va. 1976).....42

Wygant v. Jackson Board
of Education,
Slip. Op. 84-1340 (May 19, 1986),
_____ U.S. _____, ...30

OTHER AUTHORITIES

Cal. Gov't Code §12945(b)(2)
(West 1980).....passim

123 Cong. Rec. 29,662 (1977) 48

124 Cong. Rec. 36,817 (1978) 48

House Report on Civil Rights
Act of 1964, Pregnancy
Discrimination, H.R. Rep.
No. 948, 95th Cong., 2nd Sess.
3, reprinted in 1978 U.S. Code
Cong. & Ad. News 4749.....29

1 A. Larson & L. Larson,
Employment Discrimination
§38.22 (1979).....44

Pregnancy Discrimination Act of
1978, 42 U.S.C.
§2000e(k) (1982).....passim

Title VII of the Civil Rights Act
of 1964, 42 U.S.C.
§§2000e et seq. (1964).....passim

BRIEF OF COALITION FOR REPRODUCTIVE EQUALITY IN THE WORKPLACE, AS AMICI CURIAE

This brief amici curiae is filed by the Coalition for Reproductive Equality in the Workplace ("CREW"), collectively and individually. CREW is comprised of numerous organizations and individuals, whose interest is set forth in the Appendix. This brief is filed in support of Respondents.*

QUESTION PRESENTED

Whether a state statute requiring employers to correct employment policies that have a discriminatory effect on the procreative rights of working women is preempted by federal equal employment opportunity law.

---

* The parties to this action have consented to the filing, and their letters of consent are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

California law makes it an unfair employment practice for an employer to refuse to grant reasonable leave to female employees temporarily disabled by pregnancy, childbirth or related medical conditions. It thus remedies a form of sex discrimination not currently addressed by federal law -- the discriminatory impact that inadequate leave policies have on working women's right of procreative choice.

Both men and women have a constitutional right to procreative choice, a fundamental right that includes the choice to become a parent. Skinner v. Oklahoma, 316 U.S. 535 (1942); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

Leave policies that are inadequate to the needs of temporarily disabled

workers may affect the employment interests of both sexes, but such policies additionally place a burden on working women's exercise of a fundamental non-employment right -- the right of procreative choice -- while having no impact whatsoever on the procreative rights of working men. A female employee subject to an inadequate leave policy is forced to choose between exercising her right to procreate and keeping her job -- a choice her male co-workers never face.

California Government Code §12945(b)(2) (West 1980) reduces the discriminatory impact of inadequate leave policies on women's procreative rights, while conferring no special benefit on any group of employees and imposing no special burden on others. It simply allows both male and female employees to exercise their procreative

rights without jeopardizing their jobs.

In guaranteeing equal employment rights under Title VII,[1] Congress could not have intended to prevent states from enabling equal exercise by working women and men of fundamental rights such as procreative choice. Absent a clear and manifest intent to preempt, states are free to enact labor legislation, especially legislation that prohibits discrimination. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). Title VII explicitly preserves state antidiscrimination laws that cover areas broader than those covered by Title VII, see Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 101-03 (1983), and encourages the states to

---

[1] Title VII of the Civil Rights Act of 1964, Pub.L. No. 88-352,.§§701-16, 78 Stat. 241, 253-66, 42 U.S.C. §2000e through §2000e-17 (1982).

take additional measures against sex discrimination, New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67 (1980).

Title VII preempts only those state laws that are unlawful under, or inconsistent with the purposes of, Title VII. The California statute is neither. It provides an additional remedy against sex discrimination. There is no inconsistency between Title VII's goal of removing artificial barriers to equal employment opportunity between the sexes and the California statute's effect of equalizing male and female employees' ability to exercise procreative choice without jeopardizing their jobs. The Pregnancy Discrimination Act ("PDA")[2] does not

---

[2] The Pregnancy Discrimination Act, Pub.L. No. 95-555, 92 Stat. 2076, 42 U.S.C. §2000e(k) (1982).

alter this conclusion. The California statute must therefore be upheld.

ARGUMENT

I. CALIFORNIA'S PREGNANCY DISABILITY LEAVE STATUTE REMEDIES THE DISCRIMINATORY BURDEN THAT INADEQUATE LEAVE POLICIES PLACE ON WORKING WOMEN'S RIGHT OF PROCREATIVE CHOICE.

California Government Code §12945(b)(2) provides in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
>
> . . . .
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions. . . .
>
> . . . .
>
> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

Because the statute refers to "leave," rather than termination with discretionary re-hire, it implicitly grants a right of reinstatement to the employee who must leave work due to pregnancy, childbirth or related medical conditions. Stipulated Findings of Fact (Jt. App. at 44).

Employment policies that do not provide sufficient leave time or a right of reinstatement force female employees to choose between their jobs and their rights to procreate. Male employees subject to the same policies never face such a choice. The California statute addresses this discriminatory aspect of otherwise neutral leave policies, creating equality between working men and women in their ability to exercise procreative rights without job loss.

A. Procreative Choice Is A Fundamental Right Which Includes The Right To Carry A Pregnancy To Term.

This Court has, on numerous occasions, recognized procreation as a fundamental right that cannot be abridged by state action absent some countervailing and compelling governmental interest. Skinner v. Oklahoma, 316 U.S. 535 (1942); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

> The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more precious...than property rights". . . .

Stanley v. Illinois, 405 U.S. 645, 651 (1972)(citations omitted). See also Carey v. Population Services International, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of

[a] cluster of constitutionally protected choices.").

Both men and women have a fundamental right to procreate. In the context of governmental regulation of women's reproductive freedom, this Court has routinely acknowledged that procreative choice includes both the decision to terminate a pregnancy and the decision to carry a pregnancy to term. "Th[e] right... is broad enough to encompass a womans decision whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S. 113, 153 (1973) (emphasis added). See also Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Carey v. Population Services, supra.

B. Inadequate Leave Policies Discriminatorily Affect Female Employees In The Exercise Of Their Right Of Procreative Choice.

This Court has recognized that certain employment policies affect female employees' right to procreate. Cleveland Board of Education v. LaFleur, supra. The decision of an employed woman to attempt or avoid pregnancy, and to carry or terminate a pregnancy that has begun, is burdened to the extent that her employer fails to provide leave with reinstatement. As acknowledged in LaFleur, "overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of [procreative] freedoms."

414 U.S. at 640.[3] If overly restrictive policies can create a sufficiently heavy burden on procreative choice as

---

[3] In LaFleur, this Court reviewed the regulations of the school boards of Cleveland, Ohio and Chesterfield County, Virginia. The former required a pregnant teacher to take unpaid leave five months before childbirth, and did not accord eligibility to return until the next semester after her child was three months old. The latter required the teacher to leave work at least four months before childbirth, but guaranteed reinstatement by the first day of the school year after she was medically able to return. In striking down both compulsory leave rules and Cleveland's delayed reinstatement rule, this Court stated:

> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man," Skinner v. Oklahoma, supra at 541, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty.

414 U.S. at 640. The Court found Chesterfield County's rule guaranteeing more immediate reinstatement constitutionally unobjectionable.

to violate due process, surely differential burdens on procreative choice implicate equality concerns[4] -- concerns that states must be encouraged to address.

Leave policies that do not adequately protect employees from job deprivation when they are temporarily unable to work for any reason may, in a particular establishment, have a disparate impact on members of one race, sex or religion, and may thus violate Title VII unless justified by the employer. Policies that are inadequate

---

[4] This fact was implicitly acknowledged by this Court in a pre-PDA challenge to an employer's denial of accumulated seniority to employees returning from pregnancy leave. In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), this Court found such a denial to have a discriminatory effect on female employees, even though the rule itself was then deemed neutral on its face under General Electric Co. v. Gilbert, 426 U.S. 125 (1976) (overruled in 1978 by the PDA amendment to Title VII).

with respect to temporary disability due to pregnancy, however, of necessity burden the exercise of a fundamental right of one sex, while having no impact whatsoever on the same right of the other. The degree of disparity automatically created by inadequate leave policies is even greater than that urged by Respondents before the Ninth Circuit. Appellant's Opening Brief at 22-23, California Federal Savings and Loan Association v. Guerra, 758 F.2d 390 (9th Cir. 1985). While estimates that four out of five women in the labor force are likely to bear one or more children during their working lives demonstrate substantial impact, such estimates do not take into account the impact on women who decide to forego, delay or terminate pregnancy because they cannot afford to lose their jobs,

or who resign "voluntarily" because their employer's policy forces that choice.

A female employee subject to an inadequate leave policy must choose between exercising a fundamental right and keeping her job. This is a choice that no male employee is forced to make. For this reason, when a state acts to reduce or eliminate such a differential impact, it acts to <u>increase</u> equality between female and male employees.

C. <u>The California Statute Requires That Employers Adjust Leave Policies That Have A Discriminatory Effect On Female Employees' Right Of Procreative Choice</u>.

California Government Code §12945(b)(2) requires that employers who have inadequate leave policies adjust them so as to remove significant disparate impact on female employees' procreative rights. Employers whose

temporary disability leave policies are adequate to allow equal exercise of fundamental rights are not subjected to any additional requirements under the statute.

The discriminatory impact of private employment leave policies on working women's right of procreative choice is a form of sex discrimination not yet addressed by federal law. By prohibiting employers from refusing to grant job-assured leave for the period of time during which a female employee is disabled by her exercise of the right to procreate, the California statute remedies such discrimination.

D. <u>The California Statute Is Neither Over- Nor Under-Inclusive, Is Not Restrictive "Protective" Legislation, And Does Not Authorize Discriminatory Treatment Of Male Employees</u>.

1. <u>The Statute Affects Only The Discriminatory Aspects Of Leave Policies</u>.

As recognized by this Court in Stanley v. Illinois, 405 U.S. 645 (1972), procreative rights include both the right to procreate (to conceive and bear children) and the right to raise the child or children resulting from procreative activity. Both male and female parents may be burdened in the exercise of their right to raise children by employment policies that do not allow working parents time for the nurturing and supervision of children. If California sought to respond to this situation by enacting a statute that required child care leave only for female parents, such a statute would be under-inclusive, and would constitute discrimination against male parents.

California Government Code §12945(b)(2), however, is neither over- nor under-inclusive. It requires job-

protected leave only for the period during which a female employee is disabled due to pregnancy, childbirth or related medical conditions. Thus, it is narrowly drawn to remedy the discriminatory impact of inadequate leave policies.[5]

To the extent that an employer's leave policies are inadequate to the demands of caring for a child, the burden is shared by male and female parents. To the extent that such leave

---

[5] The need for additional legislation to alleviate the burdens faced by all working parents has been recognized by many. For example, Congresswoman Patricia Schroeder has introduced into the House of Representatives a bill addressing the needs of workers with children, as well as those with temporary illnesses or injuries, the Parental and Medical Leave Act of 1986, H.R. 4300. Most, if not all, members of CREW have been or are active in efforts to enact similar legislation at the federal, state, and local levels. California's statute does nothing to hinder such efforts for broader legislation.

policies are inadequate to the physical demands of pregnancy and childbirth, however, the burden is wholly visited upon women. And it is only that discriminatory burden that the California statute eliminates. The statute is not a de facto parenting leave provision available to only certain parents. It neither requires nor prohibits employment policies that provide leave to new parents of both sexes. Similarly, it does not prohibit an employer from either granting or refusing the request of any employee -- male or female -- for leave time to prepare for the arrival of a child. The statute applies only to the period of time during which the employee is "disabled on account of pregnancy, childbirth, or related medical conditions." If a particular pregnant employee is disabled for three

days, three weeks or three months, then the statute prohibits the employer from refusing to allow her to return to work once the disability is past. The statute is thus addressed to that specific area of procreative activity in which an inadequate leave policy must necessarily have a discriminatory impact on female, and only female, employees.

2. The Statute Is Not "Protective" Legislation And Does Not Affect The Rights Of Male Employees.

The California statute has been mischaracterized by some amici as "protective" legislation and thereby the kind of statute that prevents women from being treated equally in the workplace. Such an argument confuses the difference between the way in which discriminatory protective legislation operates and the effect of the California statute.

Protective legislation, such as the prohibition of women's rights to practice law, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), or the prohibition of women bartenders, Goesaert v. Cleary, 335 U.S. 464 (1948), barred women from certain activities, or from certain hours or places of employment, because of their supposedly weaker nature. In contrast, the California legislation does not mandate that women behave in a particular way. Rather, the legislation simply obligates employers to assure women who choose to bear children that their jobs will not thereby be placed in jeopardy. Under California's statute, no woman is required to take a leave -- but neither are women penalized for being the sex that may be physically disabled by the birth process.

Unlike others who have submitted briefs to the Court, we do not believe that the cause of equality is furthered by ignoring women's unique status as child-bearers. Women, and women alone, are at risk of illness from pregnancy. Women, and women alone, may have to have surgery during the childbirth process. Women, and women alone, may need time physically to recuperate from childbirth. To deny women's specific role in childbirth is to relegate women to the position of having to choose between childbirth and work. The California statute does not "protect" women from the workplace, but instead enables women to be in the workplace.

Because the California statute is narrowly drawn, it confers no "special" benefit on women that is not enjoyed by men. Men who work can work and have

children. Women who work must have some leave from work so that they too can work and have children. Indeed, the California statute enables both men and women to work and have children because, under the statute, men's partners can bear children and retain their jobs. Cf. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)(male employees are discriminated against by failure to provide pregnancy benefits to their female partners). Men are in no way harmed by the statute, and women are not given a benefit that men do not

have.[6]

II. THE CALIFORNIA STATUTE IS CONSISTENT WITH, LAWFUL UNDER, AND SUPPLEMENTAL TO TITLE VII, BECAUSE IT PROVIDES AN ADDITIONAL REMEDY AGAINST SEX DISCRIMINATION

The specific and narrow preemption language of Title VII is directed toward preserving and encouraging state and local legislation to increase sex equality. Only if state legislation tends to hinder Title VII's goal of equal employment opportunity may it be said to fall within the preemptive range

---

[6] Many of the briefs before this Court argue that one permissible response to the issues posed by this case is to interpret the California statute, alone or in conjunction with the PDA, so as to give all workers who are disabled the right to be absent from their work for a reasonable period and to be able to return to work. We have no objection to this interpretation of the statute, but, as set forth in Section II, infra, such an interpretation is not essential to this Court's upholding the validity of California's law.

of Title VII. California's pregnancy disability leave statute easily passes this test. Not only does it enhance the equality of working women with respect to the right of procreative choice, but it does so in such a way as to avoid any negative effect on other employees and to further Title VII's goal of equal employment opportunity.

A. Title VII Preempts Only State Laws That Are Inconsistent With The Purposes Of, Or Unlawful Under, Title VII.

This Court has long recognized that the fields of employment discrimination and employee rights and protections are areas of traditional state concern:

> States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples.

De Canas v. Bica, 424 U.S. 351, 356 (1976)(quoted with approval in Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. _____, 105 S. Ct. 2380, 2398 (1985)). State laws regarding employment practices are "not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978)(quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Accord Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714, 719-21 (1963).

Far from demonstrating a clear and manifest intent to preempt, "Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices."

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67 (1980). See also Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 (1983) ("Title VII does not itself prevent States from extending their non-discrimination laws to areas not covered by Title VII . . . ."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) ("[L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination.").

Title VII's language expressly

indicates its narrow preemptive reach.[7] Title VII contains two preemption provisions. One provision, 42 U.S.C. §2000e-7, explicitly preserves all state laws except those that require or permit "any act which would be an unlawful employment practice under [Title VII]." The other preemption provision, 42 U.S.C. §2000h-4, declares that Congress did not intend Title VII to occupy the field of employment discrimination or to exclude state laws in this area. It also provides that the only state laws Title VII preempts are

---

[7] The scope of Title VII preemption, like the preemptive scope of any federal statute, must be determined by the language of the statute itself and the intent of Congress. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. _____, 105 S.Ct. 2380, 2398 (1985); De Canas v. Bica, 424 U.S. 351 (1976); Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714 (1963).

those "inconsistent with any of the purposes of this Act. . . ."[8]

Thus, California's statute, which prohibits employers from denying an employee's request for reasonable pregnancy disability leave, would be preempted only if it amounted to an unlawful employment practice under, or were inconsistent with the purposes of, Title VII -- the very statute by which "Congress mandated equal access to employment and its concomitant benefits for female and male workers." House Report on Civil Rights Act of 1964, Pregnancy Discrimination, H.R. Rep. No.

---

[8] Although these preemption provisions were enacted before the passage of the PDA, that amendment did not alter them in any way. The PDA itself contains no preemption provision. It amends only the definitions portion of Title VII, and does not alter its general preemption rules.

948, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4751 (referring to the enactment of Title VII).

B. The California Statute Is Consistent With, And Lawful Under, Title VII.

This Court has recognized that Title VII is not offended by affirmative policies designed to remedy specific disadvantages suffered by particular groups in the workplace, so long as the remedial measures do not unnecessarily impinge on the rights of other groups to equal employment opportunity. In United Steelworkers v. Weber, 443 U.S. 193 (1979), an affirmative action plan that reserved for black employees 50% of the openings in a newly created in-plant training program was upheld against a challenge by a white applicant for the program.

While acknowledging that Title VII "protects whites as well as blacks from certain forms of racial discrimination," 443 U.S. at 201, the Court stated, "we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve." Id. at 204.

In Weber, the Court evaluated the combination of positive equality-enhancing effects with minimal negative effects on other employee groups. The plan at issue in that case was found lawful under Title VII because, "[t]he purposes of the plan mirror those of the statute [and, at] the same time, the plan does not unnecessarily trammel the interests of the white employees." 443 U.S. at 208. Accord Wygant v. Jackson

Board of Education, ____ U.S. ____, Slip. Op. 84-1340 (May 19, 1986) at n.9 (Opinion of Powell, J.) (citing Weber's insistence that the rights of other employees not be unnecessarily infringed).

Just as an employer's voluntary adoption of a race- (or sex-) conscious affirmative action plan is lawful under Title VII so long as it does not unduly impinge on the rights of other employees, so a state's decision to increase equality between the sexes by use of a sex-conscious statute is lawful under Title VII so long as it does not impinge on the rights of other employees.

California's statute is well within this description. It does no more than is necessary to eliminate the disparate impact on procreative rights of working

women caused by inadequate leave policies, neither requires nor allows disparagement of the rights of male employees, and enhances the equality of working men and women.

1. The Statute Does Not Competitively Advantage Or Disadvantage Any Group Of Employees.

California Government Code §12945(b)(2) does not require that an employer provide any tangible employment benefits to a worker temporarily disabled by pregnancy, nor does it require that such an employee be paid during the time she is not at work. Neither does the statute prohibit the provision of any benefit or payments to which the employee is otherwise entitled. Thus, any benefits received by an employee on such a leave are subject to exactly the same statutory

and employment regulations as benefits received by all other employees.

Similarly, the statute does not require an employer to grant any preference in hiring, promotion or seniority accrual to an employee returning from pregnancy disability leave. The returning employee is entitled only to the job she left, or to an equivalent job if the original is no longer available. Thus, the statute does not visit any burden or competitive disadvantage on any other employees, male or female. The effect on other workers' rights is not only less than that permitted in Weber -- it is non-existent.

2. The Statute Does Not Prohibit Or Discourage More Generous Non-Discriminatory Leave Policies.

The California statute does not stand in the way of further legislation to provide leave rights to working parents or for other temporarily disabled employees. It similarly does not prohibit or discourage voluntary efforts by employers to contribute to the well-being of their employees by providing greater job security or monetary benefits.

Much confusion has been engendered by misreadings of the four-month limitation on the protections of the California statute. The statute makes it an unfair employment practice to refuse to grant pregnancy disability leave for the period of disability, so long as the disability does not persist longer than four months. Thus, the statute does not require a four-month leave, but rather a leave for the period of disability.

Additionally, the statute does not create a limit on the amount of leave time an employers may grant. If an employer's general disability leave policy provides for a right of return following a disability of longer than four months, nothing in the statute would excuse the employer from following that policy with respect to workers temporarily disabled by pregnancy.[9]

3. The Statute Enhances the Equality of Working Men and Women.

California Government Code §12945(b)(2) removes an arbitrary barrier to working women's equality of procreative choice. That arbitrary barrier is the failure of many

---

[9] In fact, an employer's failure to follow its general disability leave policy in such a case would constitute unlawful discrimination under both federal and state law.

employment policies to provide job-protected leave adequate to allow working women equal exercise of procreative rights. The fact that procreative choice is not an employment right, but rather a fundamental right, does not prevent the goals of the state and federal statutes from being entirely consistent. Title VII is expressly limited to the employment relationship, and thus measures disparate impact, as well as disparate treatment, solely in terms of employment rights. But, when employment policies have a disparate impact on broader rights of sex equality, states act consistently with Title VII when they seek to reduce or eliminate that disparate impact.

The California statute eliminates barriers to equality in both procreation and employment faced by women who cannot

afford to lose their jobs when they decide to become parents. Male employees who become fathers and female employees who become mothers are thus enabled to combine procreation and employment to the same extent. Indeed, the rights of both sexes are enhanced by the California statute. To the extent that the actual ability of male employees to sire children depends on the reciprocal ability and willingness of their female partners to bear them, men's actual access to the right of procreation is enhanced by the availability of adequate pregnancy disability leave for their employed partners. Additionally, far from restricting the employment opportunities of women on the basis of stereotyped notions of "women's place," the California statute says to women: "You can keep your place

in the workforce should you decide to become a parent, just as men are able to do."

C. Title VII And The California Statute Both Remedy Sex Discrimination Arising From Facially Neutral Policies That Have A Discriminatory Impact On Working Women.

This Court has long recognized that facially neutral employment policies that have a disparate impact on the terms or conditions of employment of minority or female employees violate Title VII unless justified by the necessities of the employer's business. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices," Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971), or

"operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability," id. at 432.[10]

Additionally, in certain situations, disparate impact under Title VII exists when compliance with an employment policy is substantially more onerous for minority or female employees than for white or male employees. There are two lines of lower federal court cases that find discrimination when

---

[10] Similarly, in Dothard v. Rawlinson, 433 U.S. 321 (1977), minimum height and weight requirements for the job of prison guard were found to violate Title VII, even though applied uniformly to both male and female applicants for the job. Because the restrictions excluded 41.13% of the female population while excluding less than 1% of the male population, they were prima facie discriminatory, and, in the absence of a sufficient showing that the requirements were manifestly job related, were struck as violative of Title VII.

compliance with a work rule is more burdensome for one group. In one line, different grooming requirements for male and female employees have been accepted as non-discriminatory, but only so long as those requirements are not more burdensome for one sex than for the other. See, e.g., Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982),

cert. denied, 460 U.S. 1074 (1983).[11] In another line, identical grooming requirements for black and white employees have been found to create a

---

[11] In Gerdom, the Ninth Circuit stated:

> We thus agree with the numerous decisions defining permissible grooming rules for male and female employees as those which do not significantly deprive either sex of employment opportunities, and which are evenhandedly applied to employees of both sexes. Several courts have similarly upheld physiologically based policies which set a higher maximum weight for men than for women of the same height. In those cases, unlike this case, no significantly greater burden of compliance was imposed on either sex; that is the key consideration.

692 F.2d at 605-06 (citations omitted; emphasis added). See also Carroll v. Talman Federal Savings & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979), cert. denied, 445 U.S. 929 (1980)(Title VII violated by requirement that female bank tellers wear a specific "color-coordinated ensemble" when male tellers could wear any "reasonable business attire.").

APPENDIX

INTEREST OF AMICI CURIAE

APPENDIX

INTEREST OF AMICI CURIAE

This brief amici curiae is submitted on behalf of the Coalition for Reproductive Equality in the Workplace ("CREW"). CREW is comprised of organizations and individuals that have been active in advancing, securing, and defending women's rights, civil rights, and workers' rights.* This brief amici curiae is filed in support of Respondents.

The following signatories on the brief amici curiae are unions and other labor groups organized to promote the interests and welfare of working men and women:

---

* See Brief Amici Curiae of the American Civil Liberties Union, et al., at A-2 to A-3.

International Ladies' Garment Workers' Union (ILGWU) is a trade union consisting of more than 200,000 members in the United States, Puerto Rico, and Canada. More than 80% of its members are women, many of whom are of child-bearing age and primary sources of support for their spouses and children. Many of ILGWU's members face leave policies which do not protect them against loss of their jobs should they become disabled by pregnancy or childbirth and which seriously impede their desire to have a family.

9 to 5, National Association of Working Women is the only nationwide membership association dedicated to increasing rights and respect for women office workers. With 25 chapters and 12,000 members, 9 to 5 combines research, activism, and public education

to work for fair pay and career advancement for women, and against discrimination based on sex, race or age.

California School Employees Association (CSEA) is a labor organization of 85,000 members, which represents 140,000 classified employees in more than 700 school districts throughout California. Since 75% of CSEA's members are female, the issue of pregnancy disability leave has a direct impact upon a substantial portion of its membership.

California Federation of Teachers (CFT), AFT, AFL-CIO, with a membership of almost 30,000, represents over 180 chartered American Federation of Teachers (AFT) locals of public and private school employees. CFT seeks to further the professional and employment

interests of its membership through democratic collective bargaining, legislative and political action, and membership economic services.

American Federation of State, County and Municipal Employees (AFSCME), District Council 36 is a labor union composed of government workers. Major goals of AFSCME are the expansion of job security for its members and the elimination of employment discrimination.

Coalition of Labor Union Women (CLUW), Los Angeles Chapter is one of the largest and most active chapters in a national organization of union women and men, which was established in 1974 to secure economic equality for all working women through legislative, legal, and collective bargaining channels.

Union of Food and Commercial Workers (UFCW), Local 770 is a union representing employees in production, commercial, and service industries, which works to achieve employment security, equal opportunity, and economic betterment for its members and their families.

Utility Workers Union of America, AFL-CIO, Local 132 represents approximately 5,200 members, who are employees of Southern California Gas Company. Women comprise a third of the membership of the local, which bargains aggressively on their behalf in order to reverse the long history of discrimination against women in the workplace. Although the local has in the past successfully negotiated for disability benefits that apply to pregnancy and/or childbirth disability,

women who apply for these disability benefits are nonetheless discriminated against and penalized in their exercise of bidding, transfer, and promotion rights. The union and its members seek to protect the rights of women to take pregnancy disability leave and then return to their jobs.

Orange County Central Labor Council is chartered by the National AFL-CIO to service local unions within Orange County, California. The current membership of 100 unions and 50,000 members has as one its objectives the elimination of discrimination in the workplace and the securing of equal employment opportunity.

The following signatories on the brief amici curiae are women activists who have long been advocates of full equality for women and who have made

contributions in many fields to advance civil rights, workers' rights, and human rights:*

Betty Friedan is the author of "The Feminine Mystique," "The Second Stage," and "It Changed My Life." Among the positions and offices she has held are: Founding President, National Organization for Women; Convenor, National Women's Political Caucus; Distinguished Director, NOW Legal Defense and Education Fund; Senior Research Fellow, Center for Social Sciences, Columbia University; Fellow, Institute of Politics, Kennedy School of Government, Harvard University; Chubb Fellow, Yale University; Visiting Scholar, University of Southern

---

* Institutions and organizations listed for purposes of identification only.

California; and Co-chair, National Commission for Women's Equality, American Jewish Congress.

Yvonne B. Burke is a prominent attorney in private practice in California, who was formerly a California legislator and California Congressperson, and who has been actively involved in efforts to overcome race and sex discrimination.

Ramona Ripston is a vice president of People for the American Way, a member of the Board of Visitors of Southwestern University School of Law, and a board member of the American Friends Service Committee. Throughout her professional life she has held executive positions in organizations whose goal is to protect and expand civil liberties for all and to secure equal rights for women through

litigation, lobbying, and public education.

Dolores Huerta has served for many years as the first vice president of the United Farm Workers, a union of men and women who work primarily in the agricultural fields in California, which provides a wide range of services to its members and seeks to gain for them fair wages and working conditions.

Dr. Verna B. Dauterive, the chair of the California Commission on the Status of Women, is an administrator in the Los Angeles Unified School District and an adjunct professor at the University of Southern California. She has long been active in organizations which seek to advance the rights of minorities and women.

Rabbi Laura Geller writes and speaks extensively on issues of feminism, women and Judaism, and social action.

The following signatories on the brief amici curiae are members of the United States Congress and the California Legislature who are dedicated to securing equal rights for women:

Congressman Howard L. Berman

State Senator Diane E. Watson

Assemblywoman Maxine Waters

Assemblywoman Gwen Moore

Assemblywoman Gloria Molina

Assemblywoman Teresa P. Hughes

The following signatories on the brief amici curiae are organizations seeking primarily to advance the rights of women:

Los Angeles City Commission on the Status of Women is a seven-member board

of women leaders appointed by the Mayor and confirmed by the City Council whose purpose is to assist women achieve full participation in city government and to help promote the general well-being of women within Los Angeles.

American Association of University Women (AAUW), California State Division seeks to achieve legal, social, educational, and economic equity for women and to move women into policy-making positions in all sectors of society.

Women For: is a Southern California organization which acts to further human and civil rights and has been active in the drive for the Equal Rights Amendment and on other issues of particular concern to women.

The following signatories on the brief amici curiae are organizations working to protect the rights of racial, ethnic and/or religious minorities:

Comision Femenil de Los Angeles (CFLA) is an organization founded in the early 1970's to serve as an advocate on behalf of Latinas in education, employment, reproductive rights, housing, and health.

American Jewish Congress-Pacific Southwest Region is a subdivision of a nationwide organization of American Jews from Arizona, Nevada, and all of Southern California. It has been active in supporting the principles of reproductive equality and in working to ensure elimination of all discrimination in employment.

Mexican American Bar Association of Los Angeles County (MABA), was founded in 1960 by attorneys and judges in Los Angeles to address issues of importance to the Latino community such as civil rights, educational opportunities, and immigration rights.

Hispanic Women's Council is a California organization of women from all social, economic, educational, and political levels, dedicated to improving the status of Hispanic women through education and career development opportunities.

The following signatories on the brief amici curiae are associations of women lawyers within California:

Queen's Bench is an association of women attorneys, judges and law students in the San Francisco Bay Area which

seeks to promote the interests of women in the legal profession and to extend the rights of women in society.

Lawyers Club of San Diego is a feminist bar association representing members throughout San Diego County whose major purpose is to promote women in the legal profession.

Women Lawyers of Alameda County is a professional association formed to promote the interests of women and women lawyers and judges, with the conviction that all of society benefits from efforts to promote the economic, professional, and social equality of women.

Women Lawyers of San Luis Obispo County is an organization of women lawyers in San Luis Obispo and Santa Barbara Counties devoted to the

promotion of women lawyers as professionals and to the improvement of women's legal position in society.

Inland Counties Women at Law is an association of women in Riverside and San Bernardino Counties and the Pomona Valley area whose purpose is to promote the legal interests of women and the community in general.

Los Angeles Feminist Legal Scholars is an organization of law professors, attorneys, and law students dedicated to the study and application of feminist principles in the field of law.

The following signatories on the brief amici curiae are women professors

of law and political science at colleges and universities in California:*

Gayle Binion, University of California Santa Barbara

Mary Ellen Gale, Whittier College of Law

Christine Anne Littleton, University of California Los Angeles

Carrie Menkel-Meadow, University of California Los Angeles

Judith Resnik, University of Southern California.

---

* Institutions and organizations listed for purposes of identification only.

Planned Parenthood Federation of America, Inc. (PPFA) is a not-for-profit corporation organized in 1922. PPFA is the leading national voluntary public health organization in the field of family planning with 186 affiliates in 44 states and the District of Columbia, operating approximately 761 family planning clinics. PPFA believes in the fundamental right of each individual to manage his or her fertility regardless of income, marital status, age, national origin or residence and further believes that reproductive self-determination will contribute to an enhancement of the quality of life, strong family relationships and population stability.

AMICUS CURIAE

BRIEF

(18)

No. 85-494

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court
OF THE
United States

October Term, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,
Petitioners,
vs.
MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE — CALIFORNIA WOMEN LAWYERS; CHILD CARE LAW CENTER; JESSICA McDOWELL; LAWYERS COMMITTEE FOR URBAN AFFAIRS; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES; AND WOMEN LAWYERS OF SACRAMENTO — IN SUPPORT OF RESPONDENTS

CARMEN A. ESTRADA
Western Center on Law & Poverty, Inc.
3535 West Sixth Street
Los Angeles, California 90020

Legal Aid Foundation of Los Angeles
1550 West Eighth Street
Los Angeles, California 90017
Counsel for Amicus Curiae, Jessica McDowell

CHERYL HOUSER
JANET M. KOEHN
LORRAINE L. LODER*
SUSAN E. NASH
Counsel for All Amici Curiae

*Counsel of Record
649 South Olive Street, Suite 500
Los Angeles, California 90014
(213) 624-8407

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

28 pp

QUESTION PRESENTED

WHETHER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROHIBITS STATES FROM REQUIRING EMPLOYERS TO PROVIDE UNPAID MATERNITY LEAVE DURING THE PERIOD OF DISABILITY CAUSED BY PREGNANCY UP TO A MAXIMUM PERIOD OF FOUR MONTHS.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
I	
STATEMENT OF INTEREST OF AMICI CURIAE	2
II	
STATEMENT OF THE CASE	4
III	
SUMMARY OF ARGUMENT	4
A. Women Have Made Tremendous Gains In Labor Force Participation, Yet Still Earn Substantially Less Than Their Male Peers	5
B. The Vast Majority Of Women In The Labor Force Will Have At Least One Child During The Time They Are Employed	7
C. Increasingly, Working Women Are The Sole Support Of Their Families Or A Necessary Element Of Family Income	7
D. Normal Pregnancy Usually Results In A Lengthy Period Of Disability	9
E. Existing Maternity Leave Policies In Unregulated States Are Inadequate To Protect Pregnant Workers	10
F. In the Absence Of Adequate Leave And Reinstatement Policies, Women Are Placed At A Substantial Disadvantage In The Work Force	11
G. California's Response To And Recognition Of The Special Needs Of Pregnant Female Employees Does Not Constitute Unlawful Discrimination Against Men Under Title VII Because Men Are Not Similarly Situated	13

	Page
H. A Facially Neutral Leave Policy With Minimal Leave Time Or A Policy Which Failed To Provide For Reinstatement Would Have A Disparate Impact On Women In Violation of Title VII And The PDA	16
IV	
CONCLUSION	19

TABLE OF AUTHORITIES

Page

Cases

Abraham v. Graphic Arts International Union, 600 F.2d 811 (D.C. Cir. 1981) 17, 18

Arizona Governing Committee v. Norris, 463 U.S. 1073, 103 S.Ct. 3492 (1983) 14, 15

California Federal Savings & Loan Association v. Guerra, 758 F.2d 390 (9th Cir. 1985) 16

City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 700 (1978) 14, 15

Connecticut v. Teal, 457 U.S. 440 (1982) 18

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 18

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 16, 17

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 103 S.Ct. 2622 (1983) ..14, 15, 16

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) 17

Statutes

Cal. Gov't Code § 12945(b)(2) 11, 13

42 U.S.C. § 2000e(k) 4

Other Authorities

American Council of Life Insurance, *Women and Money* (1984) 8

Bernard Hodes Advertising, *Survey of U.S. Companies' Maternity, Paternity and Childcare Policies* ____ 10, 13

S. Bianchi & D. Spain, Bureau of the Census, U.S. Dep't of Commerce, *American Women* (1983) 7

BNA, *Policies On Leave From Work*, Personnel Policies Forum Survey No. 136 (June 1983) 10

Bureau of the Census, U.S. Dep't of Commerce, *Advance Estimates of Social, Economic & Housing Characteristics — California* (1985) 6

OTHER AUTHORITIES

Page

Bureau of the Census, U.S. Dep't of State, Series P-60m No. 124 *Characteristics of the Population Below the Poverty Level: 1978*, reprinted in *CURRENT POPULATION REPORTS* (July 1980) 8

Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports* (April 1984) 7

Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* (1984) 7, 12

Bureau of Labor Statistics, U.S. Dep't of Labor, *Women at Work* (1983) 6

Catalyst, *Report on a National Study of Parental Leaves* (June 1986) 9, 10

W. Chavkin, *Walking A Tightrope: Pregnancy, Parenting and Work*, in Double Exposure: Women's Health Hazards on the Job and At Home (1984) 7, 16

G. Hendershot, *Work During Pregnancy*, 94 Child And Family Health 426 (1979) 9

S. Kamerman, A. Kahn & P. Kingston, *Maternity Policies and Working Women* (Columbia Univ. Press 1983) 6, 9, 10, 11, 13

D. Pearch & H. McAdoo, *Women And Children; Alone And In Poverty* (Women's Research and Education Institute 1981) 8

Women's Bureau, U.S. Dep't of Labor, No. 85-4, *Facts on U.S. Working Women* (July 1985) ... 5, 6, 7

Women's Bureau, U.S. Dep't of Labor, *Time of Charge: 1983 Handbook on Women Workers* (1983) 6

Women's Bureau, U.S. Dep't of Labor, *The United Nations' Decade for Women, 1976-1985: Employment in the United States* (July 1985) 5, 6, 8

No. 85-494

In The Supreme Court

OF THE

United States

October Term, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation,

Petitioners,

vs.

MARK GUERRA, as Director of the Department of Fair Employment and Housing; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL, as Chair Commissioner of the Fair Employment and Housing Commission; FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA;

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE — CALIFORNIA WOMEN LAWYERS; CHILD CARE LAW CENTER; JESSICA McDOWELL; LAWYERS COMMITTEE FOR URBAN AFFAIRS; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES; AND WOMEN LAWYERS OF SACRAMENTO — IN SUPPORT OF RESPONDENTS.

I

STATEMENT OF INTEREST OF AMICI CURIAE

California Women Lawyers ("CWL") is a statewide bar association representing the interests of the approximately 15,000 women lawyers in the State of California. It has both individual members and 24 local affiliates throughout the state. Women Lawyers' Association of Los Angeles ("WLALA") and Women Lawyers of Sacramento ("WLS") are county-wide bar associations affiliated with CWL. The membership of CWL, WLALA and WLS includes both male and female lawyers, judges and law students, all of whom are concerned with the legal rights of and equal treatment for women. A woman's right to bear and raise children without jeopardizing her job status — the issue now before this Court — is part and parcel of her right to equal employment opportunity and equal participation in the workforce.

The Child Care Law Center ("CCLC") is a nonprofit legal services agency which works to foster the development of quality, affordable child care throughout California. Just as the development of child care is necessary to ensure equal economic opportunities for women, so is the parental leave policy at issue in this case. Through the work of CCLC, it has become apparent that both are necessary components of a comprehensive scheme that allows women to bear and raise children without being penalized in their positions of employment.

Jessica McDowell is a black woman residing in Los Angeles, California. Until her termination, she was a legal secretary who had received only good performance evaluations. Once she announced that she was pregnant, her employer began to harass her and make her work more difficult. When her pregnancy became complicated, her employer terminated her for unsatisfactory performance. Eventually her termination was changed to a medical

leave of absence (even though her employer had no medical leave policy), but she was told that she would not be allowed to return after her child was born. (In fact, she was told that "no one returns from pregnancy leaves.") She filed a complaint with federal and state agencies alleging discrimination.

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure the civil rights of Hispanics living in the United States through litigation and education. Since 1967, MALDEF's attorneys have represented plaintiffs in several hundred employment discrimination actions under Title VII and the Fourteenth Amendment.

The evidence shows that Hispanic women are significantly increasing their participation in the labor force during a time when the Hispanic population is undergoing a phenomenal growth, due in part to high birth rates. Thus, California's statute is vital to Hispanic working women in order to ensure that Hispanic women, who suffer from both sex and national origin discrimination in the work place, have equality of employment opportunities.

The San Francisco Lawyers Committee for Urban Affairs ("LCUA") began in 1968 as a local affiliate of the National Lawyers' Committee for Civil Rights under Law. LCUA became a separate California nonprofit corporation in 1978. LCUA's goal is to enlist volunteer private practitioners to redress the legal problems of poor people and minority groups. LCUA oversees a broad pro bono program, including Title VII employment discrimination cases and other civil rights and anti-poverty issues. A main LCUA concern has been the elimination of the discriminatory effects of superficially neutral policies and practices, particularly in the employment area.

II

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by Respondents in the instant case.

III

SUMMARY OF ARGUMENT

This case presents the Court with the issue of whether the State of California, without violating the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) ("PDA"), can recognize a biological fact — that only women bear children — and institute a policy which will permit women to compete equally with men in the workplace. Women in this country have struggled for decades to be afforded equal opportunities with men. Many of the amici on both sides of this issue share the goal of achieving equal opportunities for all people, regardless of sex, race, age or ethnicity. The amici only differ as to the best means of achieving that goal. In the case of female workers, these amici urge that identical treatment cannot and will not lead to equal employment opportunities for women. Women are the only members of the work force who are capable of giving birth to our future generations. If women face the loss of their jobs each time they bear a child, they will forever trail the employment status of their male peers.

Working women have an average of 2.6 children. This necessitates an average of three maternity leaves per working mother over the childbearing years. The failure of employers to provide for reasonable maternity leave and reinstatement to a previous or comparable position has an enormous impact on women in the labor force. The cumulative effects of these job interruptions on a woman's career are that she will have less job tenure than her male

co-workers and be paid lower wages than men in her same age group. Most dramatically, failing to ensure job protection for pregnant workers dractically affects minority females who have larger families and work in lower-paid occupations than their white counterparts. All women in entry level occupational categories, such as clerical, operatives and blue collar workers, will face enormous job instability and increased discrimination and job loss if California's effort to regulate reinstatement after pregnancy leave fails. In effect, women who become pregnant will be "terminated" from their positions, like amicus Jessica McDowell.

A decision invalidating the California statute will condemn women to a perpetually inferior position in the labor market. Not only will women suffer hardship as a result of the initial job loss after pregnancy; they will also be forced into a continuing effort to "catch up" and recover the job tenure, seniority, wage levels and retirement benefits lost as a result of their inability to return to previous positions. Under the PDA and this Court's own decisions, such a disparate impact more than justifies California's effort to accommodate the needs of pregnant employees.

A. Women Have Made Tremendous Gains in Labor Force Participation, Yet Still Earn Substantially Less Than Their Male Peers

Women are an ever increasing proportion of the labor force. In 1984, approximately 54 percent of all women were in the labor force. Women's Bureau, U.S. Dep't of Labor, *The United Nations' Decade For Women 1976 - 1985: Employment in the United States* 13 (July 1985) ("*Decade For Women*"). Sixty percent of women with children under 18 years old were employed outside the home. Women's Bureau, U.S. Dep't of Labor, No. 85-4, *Facts on U.S. Working Women* (July 1985). Single

mothers (including women who are single as a result of divorce or death) have a greater labor force participation rate than married mothers. Fifty-nine percent of single mothers worked in 1970; by 1982, the figure had risen to 67.7 percent. S. Kamerman, A. Kahn & P. Kingston, *Maternity Policies and Working Women* 7 (Columbia Univ. Press 1983) ("*Maternity Policies*").

Minority women have slightly greater workforce participation. Fifty-five percent (55%) of black women were in the labor force in 1984, compared to 53 percent for white women, 50 percent for Hispanic women, 64 percent for Asian women (1970) and 50 percent for Native Americans. Women's Bureau, U.S. Dep't of Labor, No. 85-4, *Facts on U.S. Working Women* (July 1985); Women's Bureau, U.S. Dep't of Labor, *Time of Change: 1983 Handbook on Women Workers* 34 (1983); *Decade for Women, supra,* at 15. In California those percentages in 1980 were 52 percent (white), 56 percent (black), 53 percent (Native American), 60 percent (Asian/Pacific Islander) and 53 percent Hispanic). Bureau of the Census, U.S. Dep't of Commerce, *Advance Estimates of Social, Economic & Housing Characteristics — California* 6-111 (1983).

Despite women's increased participation in the work force, their earnings total only 60 percent of the amounts earned by men in comparable positions. Bureau of Labor Statistics, U.S. Dep't of Labor, *Women at Work* 28 (1983). This discrepancy is at least in part the result of women having to find new employment after the birth of each child, thereby losing seniority rights, wage increases and promotional and training opportunities.

B. The Vast Majority Of Women In The Labor Force Will Have At Least One Child During The Time They Are Employed

The majority of American women are mothers at the end of their childbearing years.[1] In 1976, married women 15-44 years of age expected to have an average completed family size of 2.6 children. Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports* 21 (April 1984). Minority women tend to have larger families. The fertility rate for minority women in 1980 was 2.323, versus 1.749 for white women. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 63 (1984).

During the period from 1972-1973, women in the labor force were responsible for 42 percent of all live births in the United States. Women's Bureau, U.S. Dep't of Labor, No. 85-4, *Facts on U.S. Working Women* (July 1985). Based upon current birth patterns, it is estimated that *85 percent* of the women currently working will have a child while in the labor force. W. Chavkin, *Walking A Tightrope: Pregnancy, Parenting and Work* 206, in Double Exposure: Women's Health Hazards on the Job and At Home (1984).

C. Increasingly, Working Women Are The Sole Support Of Their Families Or A Necessary Element Of Family Income

Among working women today, earned income is a far greater economic necessity than in the past. In 1982, six out of every ten employed women said that they worked

---

[1] In 1980, only six percent of all ever-married women ages 40-44 remained childless. S. Bianchi & D. Spain, Bureau of the Census, U.S. Dep't of Commerce, *American Women* 4 (1983) ("*American Women*").

primarily to support themselves or their families. In 1980, only four out of ten women asserted that they worked because they had no choice. American Council of Life Insurance, *Women and Money* 30 (1984).

In 1984, over 10 million families (16 percent of all families) in the United States were headed by women. *Decade for Women, supra,* at 25. Sixty-one percent (61%) of these female household heads were in the labor force. *Id.* Forty-four percent (44%) of all black families were headed by women, 23 percent of Hispanic families and 13 percent of white families. *Id.*

Among married women, the earnings of working wives constituted 29 percent of family income in 1984; 37 percent in Black families, 32 percent in Hispanic families. *Id.* at 24. For married women who worked full time, the figures were 40 percent, 45 percent and 42 percent, respectively. *Id.*

In addition, more than half of the total number of families at the poverty level are headed by women. Bureau of the Census, U.S. Dep't of Commerce, Series P-60m No. 124, *Characteristics of the Population Below the Poverty Level: 1978,* reprinted in *CURRENT POPULATION REPORTS (July 1980) ("Poverty Characteristics").* Female-headed families have a poverty rate six times that of male-headed families. D. Pearch & H. McAdoo, *Women and Children: Alone And In Poverty* (Women's Research and Education Institute 1981). Among whites, the proportion of the poverty population living in female-headed families increased from 15 to 25 percent in the period from 1959 through 1980. Fifty-nine percent of the black poverty population lived in female-head households in 1980. *American Women, supra,* at 24-26. Among families of Spanish origin, over 50 percent of the female-headed families were poor. *Poverty Characteristics, supra.*

The importance of the women's earned income to the family's economic welfare and the need for reasonable maternity leave policies is evidenced by employment statistics for pregnant women. Among women who gave birth between 1970 and 1973, 42 percent worked for some part of their pregnancy, and half of these women worked during their third trimester. *Id.* at 11. Sixty-one percent (61%) of the women giving birth to a first child worked during their pregnancies. *Id.* at 11. *See also* G. Hendershot, *Work During Pregnancy,* 94 Child And Family Health 426 (1979). In 1981, more than two-thirds of the working women who gave birth to children returned to work within six months of childbirth. *Maternity Policies, supra,* at 11-12, 59, 121-22.

D. Normal Pregnancy Usually Results In A Lengthy Period Of Disability

Even normal childbirth typically results in a period of disability averaging 8-10 weeks (1-2 weeks before delivery and 6-8 weeks thereafter). Catalyst, *Report on a National Study of Parental Leaves* (June 1986). Birth by Caesarian section, a frequently used method of modern delivery, increases the disability period by another two weeks. And a substantial percent of all births result in more serious complications that extend the period of disability further. Thus, any working woman who has a child will face a lengthy disability period during which she will be unable to work. Without an adequate maternity leave and the right to return to her job, each time a woman bears a child she may also be forced to find new employment. Such a choice places women at a permanent disadvantage in the employment arena, as they will be unable to accumulate the seniority, job benefits, and wage increases of those not forced to choose between employment and childbearing.

E. Existing Maternity Leave Policies In Unregulated States Are Inadequate To Protect Pregnant Workers

Some women are already covered by maternity or disability leave policies providing paid or unpaid pregnancy leave for a period of weeks or months, plus a right to return to the job when the pregnancy disability has terminated. Catalyst, *supra*; Bernard Hodes Advertising, *Survey of U.S. Companies' Maternity, Paternity and Childcare Policies* ("Hodes"). Many others, however, are not so fortunate. A national study of maternity leave policies conducted in 1981 showed that 28 percent of all companies offered no disability leave time with a right to return to work to their employees; 39 percent of smaller companies (one to ten employees) offer no such benefits. Maternity Policies, *supra,* at 52, 56. Various other studies of larger companies have yielded somewhat higher percentages of coverage — from 75 percent to as high as 90 percent of workers in certain industries being covered by some minimal amount of disability leave. BNA, *Policies On Leave From Work,* Personnel Policies Forum Survey No. 136, at 21 *et seq.* (June 1983); Hodes, *supra.*

In a 1982 survey conducted by the Bureau of National Affairs the majority of employers surveyed provided three to six months unpaid leave. Eighty-six percent (86%) of those employers provided for a comparable, though not identical, job upon return from leave; only 51 percent of the firms applied time spent on maternity leave to the worker's seniority. BNA, *Policies On Leave From Work,* Personnel Policies Forum Survey No. 136, at 23 (June 1983). In another survey, only 72 percent of the employers surveyed guaranteed employees on maternity leave the same or a comparable job upon their return. *Maternity Policies, supra,* at 59. In smaller companies, 38 percent of workers did not have the right to return to work after a maternity disability leave. *Hodes, supra,* at App., Table

IV. No matter how generous the disability leave, it is meaningless unless accompanied by the right to return to work as required by the California statute. And 84 percent of companies in the 1981 Columbia study required minimum service requirements before the leave policies would apply, leaving another segment of pregnant workers without adequate job protection. *Maternity Policies, supra,* at 60.

It is clear from the above statistics that many working women in the United States are not covered by any disability leave policy and that many others are covered by a disability policy which fails to provide for the normal complications of pregnancy or the right to return to work.

F. In The Absence Of Adequate Leave And Reinstatement Policies, Women Are Placed At A Substantial Disadvantage In The Work Force

In the absence of reasonable maternity leave provisions, women workers who bear children face loss of livelihood, loss of health benefits, and loss of seniority. These consequences, and the supposedly neutral leave policies that impose them, place women at an employment disadvantage which the State of California properly addressed through enactment of section 12945(b)(2) of the California Government Code.

The right to maternity leave with job protection means that pregnant workers "need not fear job loss if they take time off for childbirth, but, almost as important, that their health and medical insurance, as well as other benefits, are protected while they are on leave." *Maternity Policies, supra,* at 59.

Statistics show that women have less tenure in their jobs than do men. In the Census Bureau's 1981 Current Population Survey, an occupational tenure question was asked of all workers who had the same job in 1981. Thirty-

eight percent of the women had been in the same job for less than three years, compared to 30 percent of the male respondents. Thirty-eight percent of the men, compared to 27 percent of the women, had ten or more years of experience in their jobs.

The Census Bureau reported that 4.4 percent of all women in the labor force gave birth to children in 1980. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 67 (1984). Comparable numbers of women will undoubtedly give birth in the future. Many of these women would face loss of job tenure as a result of pregnancy if the California statute is invalidated. Women in the labor force must be protected from arbitrary job interruptions and resulting wage loss due to pregnancy. While employers may argue that their leave policies are gender-neutral, in fact, such policies have an adverse impact exclusively on women who are forced to leave their jobs and start new employment in order to bear children. This immediate effect translates into a long-term disadvantage in wages and advancement, both of which depend on job tenure. The cumulative effect of these job interruptions over a woman's lifetime is that she will constantly have less job tenure and be paid lower wages than a man who started in a similar position at the same time.

Amicus briefs filed by the National Organization for Women and the American Civil Liberties Union urge that pregnancy disability does not require treatment different from other disabilities, citing statistics that men have lengths of disability similar to those of women and are more likely to be injured "on the job." ACLU notes, for example, that men and women experience an average of 4.9 and 5.1 days, respectively, per year of illness or injury. ACLU Brief at 23 *et seq.* The fundamental flaws in this argument are that (1) pregnancy *always* results in a

period of disability; (2) 85 percent of working women will bear at least one child during the time they are employed in the workforce; and (3) the average length of pregnancy disability is lengthy — averaging at least six weeks. Given the lack of adequate disability leave covering lengthy disabilities, it is clear that women are placed at a clear disadvantage in the marketplace vis a vis men. Only women must jeopardize their jobs, seniority and pay increases in choosing to bear children. Other disabilities faced by men and women may affect the job status of individual workers, but no other type of disability so completely and disadvantageously affects the ability of an entire sex to compete equally in the workforce. The recognition of this substantial difference by the State of California should not be held to violate the PDA.

Seventy-five countries, including every industrialized country except the United States, provide for maternity leave. In most countries the leave is paid and is at least sixteen weeks long. The United States is almost alone among the industrialized countries in failing to provide for job-protection for women taking maternity leave. *Maternity Policies, supra*, at 14-24. California's pregnancy leave law is nothing more or less than a recognition of the wisdom of such policies as a necessary and reasonable attempt to assure women equal employment opportunity.

G. California's Response To And Recognition Of The Special Needs Of Pregnant Female Employees Does Not Constitute Unlawful Discrimination Against Men Under Title VII Because Men Are Not Similarly Situated

As the foregoing demonstrates, the California legislature's enactment of section 12945(b)(2) advances, redresses and is arguably required to ensure equal opportunity for women. Only women face the insurmountable fact that childbirth requires maternity leave. Be-

cause women and men are not similarly situated in this regard, different policies are appropriate. Further, different policies may even be required under Title VII because the facially neutral policy urged by Petitioners here adversely affects women.

Congress enacted the PDA in order to remove any doubt that Title VII bars the deprivation of employment benefits to pregnant employees. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 2624 (1983). Standing this recognition on its head, Petitioners ask this Court to once again define away the rights of pregnant employees, based on their perception that "equal employment opportunity" means identical treatment of any and all classes of employees. This analysis ignores the very real difference between pregnant and nonpregnant employees discussed above and this Court's own guidelines for the treatment of such differences.

This Court itself has recognized where there are measurable differences between the sexes, "equal employment opportunity" may require extra effort — generally in the form of monies expended by the employer — in situations comparable to the issue presented here. *See City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492 (1983). In *Manhart*, this Court held that the Department of Water and Power's requirement that its female employees make larger contributions to the department's pension fund than its male employees constituted unlawful employment discrimination under Title VII. The Court accepted as "unquestionably true" that women "as a class, do live longer than men," that women would eventually receive a greater payment from the pension plan than men, and that "unless women as a class are assessed an extra charge, they will be subsidized, to some extent, by the class of male employees."

435 U.S. at 708-09. The Court nonetheless held that this cost differential did not justify the burden imposed on women by the department's practice. *Id.* at 716-17.

In *Norris*, the Court addressed the "pay-out" stage of a pension plan which paid women lower monthly retirement benefits than men who had made the same contributions. The Court again found that even though there was an undeniable difference between men and women's life spans, and that equal pay-outs to women would total more than the amounts paid to men, Title VII required that the additional cost be incurred. The Court noted that the PDA buttressed this conclusion:

> In enacting the PDA, Congress recognized that requiring employers to cover pregnancy on the same terms as other disabilities would add approximately $200 million to their total costs, but concluded that the PDA was necessary "to clarify [the] original intent of Title VII." [Citations omitted]. Since the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles [citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, *supra*, 462 U.S. at ____ & n.16, 103 S.Ct. at 2628 & n.16 (1983)], Congress' decision to forbid special treatment of pregnancy despite the special costs of providing benefits for female employees does not justify the use of a sex-based retirement plan.

463 U.S. at ____ n.14, 103 S.Ct. at 3499 n.14.

In short, using greater resources to accommodate pregnant women under the California statute does not elevate them from a position of inferiority to a position of superiority, but puts them in a position of parity with male coworkers in terms of ability to participate in the

workforce.[2] The California statute is thus consistent with Title VII and the PDA.

H. A Facially Neutral Leave Policy With Minimal Leave Time Or A Policy Which Failed To Provide For Reinstatement Would Have A Disparate Impact On Women In Violation Of Title VII And the PDA

Although this Court need not reach the issue of whether Title VII not only allows but actually requires pregnancy leave policies like that encompassed in the California statute, the question whether the statute unlawfully discriminates against men can also be answered by an analysis of the facially neutral leave policy which Petitioners contend is required here. As set out above, the number of women of childbearing age in the workforce has increased dramatically. A facially neutral policy allowing only a shorter leave or a leave without guaranteed reinstatement could adversely affect up to 85 percent of the women in the work force, at least once in their lives. W. Chavkin, *supra*. This deprivation of employment opportunity is precisely what the PDA seeks to eliminate.

This Court recognized the burden imposed on women by a similarly "neutral" policy in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), in holding that an employer's

[2]Amici submit that the Ninth Circuit correctly analyzed the distinction between this case and *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, *supra*, in pointing out that the total nonpregnancy disability package offered men and women is unaffected by the California statute. *California Federal Savings & Loan Association v. Guerra*, 758 F.2d 390, 393 (9th Cir. 1985). In addition, *Newport News* required equal treatment of employees who were similarly situated — by requiring that all employees and their spouses receive full disability coverage. *Newport News* did not address employees with different needs, i.e., employees requiring leave during the period of disability caused by pregnancy.

policy of denying accumulated seniority to female employees returning to work following disability caused by childbirth violated Title VII. The employer did not guarantee job reinstatement but instead placed returning women in any open position for which they were qualified and which no current employee sought. The same return policy was applied to nondisability leaves taken by women or men.[3]

Despite the seeming facial neutrality, this Court found it beyond dispute "that petitioner's policy of depriving employees returning from pregnancy leave of their accumulated seniority acts both to deprive them of "employment opportunities" and to "adversely affect [their] status as an employee." 434 U.S. at 141. This Court further found that "petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer" in violation of Title VII. *Id.* at 142. In language that applies equally here, this Court refused "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.*

Similarly, California has only required that employers recognize the special needs of childbearing in a manner consistent with this and other courts' view that facially neutral policies do not always take these needs into account.[4] *See, e.g., Abraham v. Graphic Arts International*

[3]*Satty*, of course, was decided before Congress enacted the PDA requiring employers to treat pregnancy like any other disability, but its analysis of the impact on women is still valid here.

[4]The biological fact that pregnancy requires a recuperation period and the recognition that equal employment opportunity requires accomodation of this fact cannot be compared, as Petitioners suggest, to the stereotypical assumptions behind the "protective" statutes found to violate Title VII. *See, e.g., Rosenfeld v. Southern Pacific Co.*,

Union, 660 F.2d 811, 819 (D.C. Cir. 1981) ("ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age — an impact no male would ever encounter"). *Cf. Connecticut v. Teal*, 457 U.S. 440 (1982) (job test for promotions given to all employees has disparate impact on blacks and violates Title VII); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (requirement of high school education or passing standardized general intelligence test as condition of employment violates Title VII where requirement disqualified blacks at higher rate and had no significant relationship to job performance). To overturn the California Legislature's decision in the interests of the "blind neutrality" urged by Petitioners would be to ignore the realities faced by working women and to continue to deprive them of equal status in the working world.

---

444 F.2d 1219 (9th Cir. 1971) (invalidating limitation on lifting of weights and hours women could work). Rather than restrict women's employment opportunities, California's requirement of pregnancy leave and reinstatement expands those opportunities and ensures that childbearing women can compete in the workforce with men who do not share the childbearing responsibility.

IV

CONCLUSION

Because women are the childbearers and childbearing requires a recuperation period, women can only obtain equal employment opportunity if they are reinstated in their original jobs after a pregnancy leave. Otherwise, women will face two to three job changes in their childbearing years with the concomitant loss of seniority and wages — a burden not shared by men. The effect of these losses is cumulative over the working life of each woman, resulting in permanent inequality. The California pregnancy leave statute attempts to alleviate this burden by ensuring that women will be reinstated to their previous positions after pregnancy leave, unless business necessity requires otherwise. This statute is consistent with the recognition by Title VII, the PDA and this Court that "equality" does not always mean "neutrality." The Ninth Circuit's decision should therefore be affirmed.

Respectfully submitted,

CARMEN A. ESTRADA
Western Center on Law
Poverty, Inc.

Legal Aid Foundation of
Los Angeles

CHERYL HOUSER
JANET M. KOEHN
*LORRAINE L. LODER
SUSAN E. NASH

By LORRAINE L. LODER

Attorneys for Amici Curiae
**Counsel of Record*

June 11, 1986

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 11, 1986, I served the within Amici Curiae Brief in re: "California Federal Savings and Loan Association v. Mark Guerra" in the United States Supreme Court, October term 1985, No. 85-494;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John K. Van De Kamp
Attorney General of the
State of California
Andrea Sheridan Ordin
Chief Assistant
Attorney General
Marion M. Johnston
Deputy Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94101
Attorneys for Respondents

Willard Z. Carr, Jr.
Theodore B. Olson
Pamela L. Hemminger
Paul Blankenstein
Jan E. Eakins
Gibson, Dunn & Crutcher
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Petitioners

All Parties required to be Served have been Served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 11, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

(13)

No. 85-494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,
Petitioners,

v.

MARK GUERRA, AS DIRECTOR OF DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TODD D. PETERSON
BARBARA E. ETKIND
NANCY L. ZISK
ROSS, DIXON & MASBACK
2000 Pennsylvania Ave., N.W.
Suite 10800
Washington, D.C. 20006
(202) 828-4800
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, prohibits an employer from affording its female employees unpaid leave for disability arising out of pregnancy, childbirth, or related medical conditions, if it does not provide unpaid leave for other disabilities.

2. Whether, if Title VII were construed to prohibit employers from affording unpaid leave for disabilities arising out of pregnancy, childbirth, or related medical conditions if they do not provide unpaid leave for other disabilities, the statute would preempt a state law that requires employers to afford disability leave for pregnancy, childbirth, or related medical conditions and permits, but does not require, them to provide leave for other disabilities as well.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF AUTHORITIES	(v)
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT OF 1978, DOES NOT PROHIBIT AN EMPLOYER FROM GRANTING ONLY PREGNANCY-RELATED DISABILITY LEAVE	5
A. The Plain Language Of The PDA Provides No Basis For Prohibiting An Employer From Making Disability Leave Available Only For Pregnancy-Related Conditions	6
B. The Legislative History Of The PDA Dispels Any Suggestion That The Act Was Intended To Prohibit Employers From Providing Disability Leave Only For Pregnancy	10
C. The Analysis Employed By This Court In *Newport News* Confirms That The PDA Does Not Prohibit Discrimination In Favor Of Pregnant Persons	17
II. EVEN IF TITLE VII, AS AMENDED BY THE PDA, WERE INTERPRETED TO PROHIBIT AN EMPLOYER FROM PROVIDING DISABILITY LEAVE ONLY FOR PREGNANCY, THAT STATUTE WOULD NOT PREEMPT SECTION 12945(b)(2)	20
A. There Is A Strong Presumption Against Preemption In This Case	21

TABLE OF CONTENTS—Continued

	Page
1. *In enacting Title VII and the PDA, Congress intended to preserve state law*	21
2. *Under the preemption standard applicable in this case, the state statute should be upheld unless employers could not reasonably comply with both the federal and state statutes or unless there is compelling evidence that the California legislature would not have enacted Section 12945(b)(2) if it had known the PDA would require equal treatment for disabilities unrelated to pregnancy*	23
B. Nothing In The Language Or Legislative History Of Section 12945(b)(2) Warrants Preemption In This Case	25
CONCLUSION	29

TABLE OF AUTHORITIES

CASES:	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	22
Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972)	28
City of Los Angeles v. Manhart, 435 U.S. 702 (1978)	8-9
Geduldig v. Aiello, 417 U.S. 484 (1974)	5
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	*passim*
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)	21
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)	14
Homemakers, Inc. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976)	28
Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982)	23
Louisiana Public Service Comm'n v. FCC, No. 84-871 (U.S. May 27, 1986)	21
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)	7
Miller-Wohl Company, Inc. v. Commissioner of Labor and Industry, et al., No. 84-1545 (J.S. filed March 27, 1985)	17
Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)	*passim*
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)	22, 23
New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973)	21
Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963)	21
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971)	28
Schwartz v. Texas, 344 U.S. 199 (1952)	21
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	22, 23
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art. VI, cl. 2 (Supremacy Clause)	21

TABLE OF AUTHORITIES—Continued

STATUTES: Page

Federal

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. § 2000e *et seq.* ..... *passim*
42 U.S.C. § 2000e-2(a) (1) 6, 19
42 U.S.C. § 2000e-7 ..... 22, 23, 26
Civil Rights Act of 1964, Tit. XI, 42 U.S.C. § 2000h-4 ..... 1, 22, 23
Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) ..... *passim*
Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1973) 8

State

Cal. Gov't Code § 12945(b) (2) (West 1982) ..... *passim*
Conn. Gen. Stat. Ann. § 46a-60(a) (7) (West 1985) 17
Mont. Code Ann. §§ 49-2-310, 49-2-311 (1985) 17

LEGISLATIVE MATERIALS:

Federal

Legislative History of the Pregnancy Discrimination Act of 1978 (1980) ..... *passim*
H.R. Rep. No. 948, 95th Cong., 2d Sess. (1978) 12, 16, 17
S. Rep. No. 331, 95th Cong., 1st Sess. (1977) 12, 15, 23
123 Cong. Rec. (1977)
p. 8144 10-11
p. 10581 8
p. 10582 12
p. 29385 16
p. 29645 16
p. 29664 13
124 Cong. Rec. (1978)
p. 21436 11
p. 21440 11
p. 21442 11

TABLE OF AUTHORITIES—Continued

Page

p. 36818 ..... 11, 13, 14
pp. 38573-38574 11

State

Enrolled Bill Report, *Agriculture and Services—Industrial Relations* (Sept. 11, 1978) 27
Letter, Assemblyman Bill Lockyer, Chairman, Assembly Labor, Employment and Consumer Affairs Comm. to Senator Bill Greene, Chairman, Senate Industrial Relations Comm. (April 14, 1978) 27
Memorandum, Department of Industrial Relations, Agriculture and Services Agency to Assemblyman Howard Berman (September 14, 1978) 27

BOOKS AND PERIODICALS:

Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971) 9
Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L. Rev. 375 (1981) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-494

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Petitioners,

v.

MARK GUERRA, AS DIRECTOR OF DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case concerns civil rights legislation, a prerogative of the States as well as the federal government. Section 1104 of Title X! of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4. Exercising its concurrent regulatory

power, California, as well as other States, including Connecticut, Massachusetts, and Montana, has made it an unlawful employment practice for an employer to refuse to allow a female disabled by pregnancy, childbirth, or related medical conditions to take an unpaid leave of absence for a reasonable time on account of such disability. The United States Court of Appeals for the Ninth Circuit upheld the California law against a preemption challenge based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (the "PDA" or the "Act").

This ruling is significant to *amici* for several reasons. First, many States have long and respected traditions of guaranteeing civil rights beyond the requirements of federal law. These protections would be threatened if this Court were to invalidate the disability leave requirement at issue in this case.

Second, this case involves a federal statute that contains a narrow preemption provision; only state laws that are inconsistent with federal law, or that require an employer to violate federal law, are preempted. The correct interpretation of this kind of preemption provision is of general importance to state governments because a broad reading would expand federal law at the expense of state authority, not only in the area of civil rights but in every area of concurrent state and federal regulation.

Third, even if this Court were to disagree with the construction of the PDA adopted by the court of appeals, the appropriate remedy is not to invalidate the state law but rather, by virtue of Title VII, to require employers to provide benefits on a basis broad enough to avoid discrimination. Only this remedy would properly respect both the intent of Congress to allow the States to impose additional obligations in their area of concurrent authority and the right of the States to do so if they so choose.

Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

SUMMARY OF ARGUMENT

I. Congress enacted the PDA in order to overrule this Court's holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that Title VII permitted discrimination against female employees because of pregnancy-related disabilities. Congress did not address the issue of discrimination in favor of pregnancy-related disabilities and against non-pregnancy-related disabilities. This focus is clearly reflected in the language of the PDA, which amended Title VII to prevent employers from discriminating *against* any person because of that person's pregnancy. The PDA did not proscribe discrimination because of non-pregnancy.

The legislative history of the PDA confirms this conclusion. Congress's intent in enacting the PDA was to provide relief to working women and to end discrimination against pregnant employees, not to confer rights or benefits on men or non-pregnant women. To the extent that Congress addressed the question of preferential treatment at all, it intended only that the PDA would not *require* employers to give preferential treatment to pregnant employees, not that it would *prohibit* them from doing so.

The analysis that this Court employed in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), also confirms that the PDA was not intended to protect non-pregnant persons. In striking down a health insurance plan that provided less extensive pregnancy-related benefits to the wives of male employees than to female employees (where the coverage provided for hus-

---

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

bands of female employees and male employees was identical), the Court made clear that the plan violated Title VII because it discriminated against male employees on account of their sex—male—*not* on account of their non-pregnancy.

II. Even if Title VII, as amended by the PDA, were interpreted to prohibit employers from providing only pregnancy-related disability leave, it would not preempt Cal. Gov't Code § 12945(b)(2) (West 1982). The language and the legislative history of Title VII, as amended by the PDA, demonstrate Congress's intent to preserve state anti-discrimination laws. As a result, if it is possible for an employer to comply with both Title VII and a state civil rights law, there is a compelling presumption against preemption of the state law. In that case, the state statute should be invalidated only if it is indisputable that the state legislature would not have enacted the statute had it been aware of the consequences of federal law.

Nothing in the language or legislative history of Section 12945(b)(2) overcomes the presumption against preemption. First, the requirements of the statute do not conflict with the prohibitions contained in the PDA. Section 12945(b)(2) simply requires a California employer to provide a leave of absence to employees who are disabled by pregnancy. Nothing in the statute prevents an employer from extending the same relief to employees who are disabled for reasons other than pregnancy. Second, nothing in the legislative history of Section 12945(b)(2) suggests that the California legislature would not have required employers to provide pregnancy-related disability leave had it known that, if it did so, Title VII would require employers to extend the same benefit to employees disabled for reasons other than pregnancy. Employers in California thus must comply with both Title VII and Section 12945(b)(2), as written.

ARGUMENT

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT OF 1978, DOES NOT PROHIBIT AN EMPLOYER FROM GRANTING ONLY PREGNANCY-RELATED DISABILITY LEAVE.

It is by now a commonplace that the PDA was passed in order to overrule legislatively this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *Gilbert* involved a challenge to General Electric's employee disability plan, which excluded from coverage disabilities arising from pregnancy. The plaintiffs, representing a class composed of present and former employees of General Electric who were pregnant during their employment with the Company, claimed that General Electric's exclusion of pregnancy-related disabilities from its disability plan constituted discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* This Court upheld the General Electric plan. Relying largely on its decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." 429 U.S. at 136.

Congress intended to overrule the holding in *Gilbert* by enacting the PDA. By amending Title VII to prohibit discrimination *against* female employees because of pregnancy-related disabilities, however, Congress did not intend to outlaw employment practices that *favored* employees disabled by pregnancy-related conditions. This legislative judgment is reflected in the statutory language and the legislative history, and has been noted by this Court.

A. The Plain Language Of The PDA Provides No Basis For Prohibiting An Employer From Making Disability Leave Available Only For Pregnancy-Related Conditions.

The PDA amended the definitional section of Title VII by adding Section 2000e(k), which provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k). Accordingly, in order to construe the PDA, it is necessary to insert the new statutory language "because of or on the basis of pregnancy"[2] into the substantive provisions of Title VII. By virtue of the PDA, it is thus an unlawful employment practice for an employer, for example,

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, [pregnancy,] or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

When read in context, the first clause of the PDA provides no basis for invalidating disability leave for pregnancy on the ground that such an employment practice

[2] Throughout this brief, *amici* employ the term "pregnancy" as shorthand for the statutory phrase "pregnancy, childbirth, or related medical conditions."

discriminates against non-pregnant persons. The language added by the PDA to Title VII protects only those who are pregnant. *See Newport News*, 462 U.S. at 675 n.11 (the first clause of the PDA "should be construed to prohibit discrimination against a female employee *on the basis of her own pregnancy*" (emphasis added)). The first clause does not, by its terms, prohibit discrimination based upon non-pregnancy. Nor does it state that employers may not make any distinctions based on *whether* a disability is pregnancy-related; it states only that a person cannot be discriminated *against* "because of such individual's pregnancy." A non-pregnant person simply cannot be discriminated against "because of such individual's pregnancy."

Petitioners' argument that Title VII protects men as well as women, and whites as well as blacks,[3] misses the critical distinction between a prohibition against discrimination based upon a characteristic that is universal (everyone has a sex or race) and a characteristic that is possessed by only part of the population, like pregnancy. Title VII prohibits only discrimination *against* an individual because of race, sex, etc. The statute does not forbid preferential treatment except where such treatment inevitably involves discrimination against another individual on one of the enumerated grounds, which is always the case where the basis for the discrimination is a universal characteristic. For example, discrimination in favor of one person because of race or sex is necessarily accompanied by discrimination against another person on account of race or sex. For that reason, whites as well as blacks and men as well as women are protected by Title VII.

If, however, Title VII prohibited only discrimination against a person because such person were black (a non-

[3] *See* 462 U.S. at 675-676 n.11, 682; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976).

universal characteristic), the statute would not protect whites. In effect, that is precisely how the PDA treats pregnancy. It does not prohibit discrimination based upon a universal characteristic; it prohibits discrimination based upon a characteristic possessed by only a limited segment of the population—pregnant women. Because pregnancy is a non-universal characteristic, preferential treatment of pregnant women does not involve discrimination against non-pregnant persons on account of their pregnancy, but rather on account of their *non*-pregnancy. Non-pregnancy, however, is not a prohibited basis of discrimination under Title VII. Therefore, unlike whites and males, non-pregnant individuals do not come within the purview of the statute.[4]

This distinction accurately reflects the legislative judgment underlying the PDA that discrimination *against* pregnancy-related disabilities is sex discrimination.[5] By contrast, because both women and men can be non-pregnant, discrimination against non-pregnant persons is, as a matter of fact, not discrimination on the basis of sex. Although this distinction lacks symmetry, its validity is confirmed by reference to the "simple test" for sex discrimination that the Court adopted in *City of Los*

---

[4] The PDA is not without precedent in prohibiting discrimination against a particular segment of the population that possesses a trait that the remainder does not. For example, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination against an "otherwise qualified handicapped individual . . . solely by reason of his handicap."

[5] In reintroducing the proposed PDA in the House of Representatives on April 5, 1977, Representative Hawkins explained, "it seems only commonsense, that since only women can become pregnant, discrimination *against* pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy." 123 Cong. Rec. 10581 (1977), *reprinted in Legislative History of the Pregnancy Discrimination Act of 1978 ("Leg. Hist.")* at 23 (1980) (emphasis added).

Angeles v. Manhart, 435 U.S. 702, 711 (1978), *quoting from Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971)—"whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" But for the female employee's sex, she could not be pregnant; thus, but for her sex, she could not be discriminated against on the basis of pregnancy. By contrast, a non-pregnant employee's sex is not a "but for" cause of discrimination because both men and women can be non-pregnant. Thus, discrimination on the basis of non-pregnancy is not discrimination on the basis of sex.

Petitioners ignore the clear language of the first clause of the PDA and rely instead on the second clause of the Act, quoted at p. 6, *supra*, to argue that pregnant employees may be treated no less *and no more* favorably than employees who are not pregnant. Such reliance also is misplaced.

First, as petitioners acknowledge, the second clause of the PDA was intended simply to "explai[n] the effect" of the first clause, not to add anything of substance to the statutory prohibition. *See* Pet. Br. at 19; *cf. Newport News*, 462 U.S. at 678 n.14. Accordingly, if an employment practice is not violative of the first clause of the Act, it is not prohibited by the PDA.

Second, the construction of the PDA's second clause urged by petitioners—that employees disabled by pregnancy must be treated no worse *and may not be treated any better* than other disabled employees—is not required by the statutory language. The provision, after all, is phrased in terms of protecting the civil rights of women ("women affected by pregnancy . . . shall be treated the same . . . as other persons . . ."). Hence, in view of the concededly remedial nature of the Act, the statutory language should be interpreted to require only that employers raise the level of benefits provided to

pregnant employees to the level of benefits afforded employees who are disabled for other reasons.

Third, petitioners' insistence that the PDA mandates absolute equality between employees who are disabled by pregnancy and those who are disabled for other reasons is belied by the nature and operation of the statute itself. The Act, after all, is entitled the *Pregnancy* Discrimination Act, not the Disability Discrimination Act. If a pregnant employee is the object of discrimination, and another employee is discriminated against because of some other disability, only the pregnant employee would have recourse under the PDA. Discrimination in favor of pregnancy thus was inherent in enactment of the statute itself. *See* Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L. Rev. 375, 407 (1981).

Finally, as set forth in detail below, the purpose of the second clause was to reassure potential critics that the PDA would not *require* more favorable treatment for pregnant women. The history of Congress's deliberations makes clear that the legislature intended only to prohibit employers from treating employees who are disabled by pregnancy *less* favorably than their co-workers who may be disabled for other reasons.

B. The Legislative History Of The PDA Dispels Any Suggestion That The Act Was Intended To Prohibit Employers From Providing Disability Leave Only For Pregnancy.

There is no suggestion in the legislative history of the PDA that Congress intended to confer any rights or benefits on men or non-pregnant women. To the contrary, the reports, debates, and hearings make abundantly clear that the Act was intended to provide relief to working women and to end discrimination against pregnant workers.[6] Although Congress's focus on the needs of female

[6] *See, e.g.*, 123 Cong. Rec. 8144 (1977), *reprinted in Leg. Hist.* at 17 ("legislation which will end employment discrimination against pregnant workers") (remarks of Sen. Bayh); 124 Cong. Rec. 36818 (1978), *reprinted in Leg. Hist.* at 203 (the "bill represents only basic fairness for women employees") (remarks of Sen. Javits). *Accord, id.* at 21436 (remarks of Rep. Sarasin); *id.* at 21440 (remarks of Rep. Thompson); *id.* at 21442 (remarks of Rep. Tsongas); *id.* at 38573-38574 (remarks of Rep. Weiss and Rep. Sarasin), *reprinted in Leg. Hist.* at 169, 179, 185, 207-209.

members of the work force "does not create a 'negative inference' limiting the scope of the act to the specific problem that motivated its enactment" (*Newport News*, 462 U.S. at 679), the legislative history of the PDA reveals a striking lack of concern about employment practices that discriminate in favor of pregnant women.

In support of their argument that the PDA prohibits employment practices that discriminate in favor of pregnant women as well as practices that discriminate against them, petitioners and their *amici* cite two categories of excerpts from the legislative history: (1) statements to the effect that the PDA does not *require* employers to extend any benefits to pregnant employees that they do not provide to employees who are disabled by other conditions; and (2) statements to the effect that equal treatment of pregnant and non-pregnant employees will constitute compliance with the PDA. Neither line of legislative history supports petitioners' construction of the statute and, in fact, both support the conclusion that the PDA was not intended to prohibit more favorable treatment of pregnancy-related disabilities.

As the briefs reflect, the legislative record is replete with assurances that the PDA would not *require* employers to extend to pregnant employees any benefits that they do not extend to employees who are disabled for other reasons. The House Report explained that the proposed legislation

> does not *require* employers to treat pregnant employees in any particular manner . . . . H.R. 6075

> in no way *requires* the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

H.R. Rep. No. 948, 95th Cong., 2d Sess. 4 (1978) ("House Report"), *reprinted in Leg. Hist.* at 150, *quoted in* Pet. Br. at 21; Chamber of Commerce Br. at 7-8 (emphasis added). The Senate Report is to precisely the same effect:

> [T]he bill does not *require* employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply *require* that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977) ("Senate Report"), *reprinted in Leg. Hist.* at 41, *quoted in* U.S. Br. at 13-14; Chamber of Commerce Br. at 7 (emphasis added).

In reintroducing the proposed legislation in the House of Representatives on April 5, 1977, Representative Hawkins similarly made clear that, under the PDA,

> [a]n employer who does not now provide disability benefits to his employees will not *have to* provide such benefits to women disabled due to pregnancy and childbirth.

123 Cong. Rec. 10582 (1977), *reprinted in Leg. Hist.* at 25, *quoted in* Chamber of Commerce Br. at 8 (emphasis added). In the same vein, several of petitioners' *amici* rely on the following remarks by Senator Brooke:

> I would emphasize most strongly that S. 995 in no way *provides* special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men.

123 Cong. Rec. 29664 (1977), *reprinted in Leg. Hist.* at 135 (emphasis added), *quoted in* U.S. Br. at 15; Chamber of Commerce Br. at 8-9; A.C.L.U. Br. at 40. None of these excerpts supports petitioners' thesis that the Act *prohibits* an employer from affording leave time only for disabilities occasioned by pregnancy. To the contrary, the cited passages establish nothing beyond the fact that the PDA does not *require* such a practice—a proposition that *amici* do not dispute.

Indeed, the floor statements and reports that petitioners cite affirmatively support *respondents'* position that nothing in the PDA prohibits an employer from providing leave only for disability caused by pregnancy. It is highly telling that when directly addressing the effect that the PDA would have on employment practices that favor pregnant employees, Congress consistently stated only that the proposed legislation would not require such treatment. If, as petitioners contend, Congress had intended to make preferential treatment of pregnant employees unlawful, it would have been the height of understatement to note only that the proposed legislation would not *require* such conduct on the part of employers, not that the statute would *prohibit* it.[7] In short, if Congress

---

[7] While acknowledging that "most of [the PDA's] legislative history was devoted to a discussion of discrimination *against* pregnant women," NOW maintains that Congress also specifically expressed its intent to prohibit discrimination in favor of pregnant employees as well. NOW Br. at 7. The sole "support" that NOW musters for this assertion is Senator Williams' observation that leaves of absence from employment *for purposes of childcare* must be made equally available to male and female employees. In this regard, Senator Williams remarked: "[I]t would be equally as valid to permit a man to take a voluntary leave *for the purposes of childcare* as it would be to permit a woman who had recently given birth to take a voluntary leave *for that purpose.*" 124 Cong. Rec. 36818 (1978), *reprinted in Leg. Hist.* at 201 (emphasis added). Senator Williams thus was not discussing the availability of leave

had intended to make preferential treatment of pregnant employees unlawful, one would have expected the legislators to say so.[8]

In fact, given the overwhelming legislative concern for protecting the employment rights of pregnant women, it is highly unlikely that Congress would have outlawed practices designed to favor pregnant employees. As noted above, the legislative history is replete with clear statements that the purpose of the PDA was to end discrimination against pregnant employees. *See* note 6, *supra*. This concern did not extend to discrimination in favor of pregnant employees. Prior to the PDA, employers were permitted to provide preferential treatment for pregnant employees. It is inconceivable that Congress would have chosen a bill designed to *aid* pregnant employees as a vehicle to *prohibit* employers from offering benefits solely for those employees.

Petitioners also rely on legislative history that virtually tracks the PDA's second clause by stating that employees who are disabled by pregnancy must be treated the same as employees who are disabled for other rea-

---

on account of disability, but rather "parenthood" leave (*ibid.*), *viz.*, "leaves of absence from work *for the purposes of preparing for and caring for* . . . infants" (*ibid.*; emphasis added). Because these purposes differ from "pregnancy, childbirth, and related medical conditions," the criteria for relief under the PDA, that Act is not implicated. Rather, as Senator Williams suggested, Title VII's original prohibition of sex discrimination would control. As previously noted, men as well as women are protected under that provision.

[8] Although Congress is not required " 'to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute,' " U.S. Br. at 13, *quoting Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980), it is implausible that Congress would have extensively discussed only its intent not to *require* preferential treatment if in fact it had intended to *prohibit* preferential treatment. Moreover, as discussed in part I.A., *supra*, the statutory language does not indicate an intent to prohibit preferential treatment of disabled pregnant employees.

sons. A careful reading of this legislative history confirms, however, that the provision was intended only to describe the minimum treatment necessary for compliance with the Act, and not to establish a limitation on the benefits that an employer is permitted to afford an employee disabled by pregnancy.

As petitioners acknowledge, all of the statements on which they rely "were made in the context of a legislative effort to eliminate pregnancy as an occasion for invidious discrimination." Pet. Br. 23 n.9. Accordingly, the cited statements provide an uncertain basis from which to extrapolate Congress's views concerning discrimination in *favor* of pregnant employees.

Moreover, those statements reveal that Congress viewed equality of treatment of pregnant and otherwise disabled persons as *minimum* compliance with the new statute, not as a *cap* on the extent of relief employers were permitted to afford pregnant employees. For example, the Senate Report explained:

> By defining sex discrimination to include discrimination *against* pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions.

Senate Report at 4, *reprinted in Leg. Hist.* at 41, *quoted in* Pet. Br. at 21 (emphasis added). Although petitioners cite the passage as evidence of "an unambiguous intent that pregnancy disabilities be treated in the same manner as other disabilities" (Pet. Br. 21), the sentence plainly refers only to discrimination *against* pregnant employees. It does not suggest that Congress intended to prohibit practices in favor of pregnant women.

Other legislative history confirms that Congress's concern for equality represents an intent to prohibit only discrimination *against* pregnant women, not preferential treatment of them. Petitioners rely on the following remarks by Senator Williams:

> The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work. The key to compliance in every case will be equality of treatment. In this way, *the law will protect women* from the full range of discriminatory practices which have adversely affected their status in the work force.

123 Cong. Rec. 29385 (1977), *reprinted in Leg. Hist.* at 62-63, *quoted in* Pet. Br. at 22-23 (emphasis added). To the same effect, Senator Stafford observed:

> When an employer treats pregnancy, childbirth, and related conditions the same as he treats any other disabling condition, then he has complied with this bill.

123 Cong. Rec. 29645 (1977), *reprinted in Leg. Hist.* at 83, *quoted in* Equal Employment Advisory Council Br. at 10.

These excerpts do no more than confirm Congress's intent to *improve* the disability benefits made available to pregnant women. The legislative history consistently demonstrates that in order to comply with the PDA all that an employer must do is treat its pregnant employees no *less* favorably than its other employees. Congress simply was not concerned with whether, or to what extent, pregnant employees were treated *more* favorably than other employees.

Finally, congressional acknowledgment of statutes similar to California's further supports respondents' position. The House Report noted that "six States, as well as the District of Columbia, specifically include pregnancy in their Fair Employment Practices laws: Alaska, Connecticut, Maryland, Minnesota, Oregon, and Montana." House Report at 11, *reprinted in Leg. Hist.* at 157. Significantly, at the time that the House Report was submitted, both Connecticut and Montana prohibited an employer

from refusing to provide an employee with a reasonable leave of absence on account of pregnancy-related disability and with reinstatement to her original job or to an equivalent position unless the employer's changed circumstances made it impossible or unreasonable to do so. *See* Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West 1985); Mont. Code Ann. §§ 49-2-310, 49-2-311 (1985).[9]

It is highly unlikely that these statutes would have been singled out for specific mention in the House Report if they had been deemed inconsistent with the PDA. Moreover, there is no support for petitioners' speculation that Congress was not aware of the contents of the state statutes that it cited. To the contrary, the legislative record indicates that Congress examined and parsed the state statutes (as well as the administrative and judicial constructions that had been placed on them), to which it referred in its reports and proceedings. *See, e.g.*, House Report at 11, *reprinted in Leg. Hist.* at 157. Accordingly, the conclusion that follows most naturally from this legislative history is that Congress found no inconsistency between the proposed PDA and state statutes, like Section 12945(b)(2), that require employers to provide a leave of absence to an employee disabled by pregnancy, regardless of whether such leave is available to an employee who is otherwise disabled.

C. The Analysis Employed By This Court In *Newport News* Confirms That The PDA Does Not Prohibit Discrimination In Favor Of Pregnant Persons.

This Court's only construction of the PDA to date was rendered in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), which makes clear that the Act was not intended to protect non-pregnant persons. *Newport News* involved a private health insur-

---

[9] The validity of the Montana legislation is before the Court in *Miller-Wohl Company, Inc. v. Commissioner of Labor and Industry, et al.*, No. 84-1545 (J.S. filed March 27, 1985).

ance plan that provided full hospitalization benefits for male and female employees, but provided less extensive pregnancy-related benefits to the wives of male employees than to female employees. Coverage under the plan for husbands of female employees was identical to the coverage provided for male employees. A male employee challenged the plan and claimed that Newport News had unlawfully refused to provide full insurance coverage for his wife's hospitalization due to pregnancy.

The district court upheld the Company's plan on the ground that the PDA's protections extended only to female employees, not to spouses of male employees, but the Fourth Circuit reversed. This Court affirmed the judgment of the court of appeals.

Significantly, for purposes of this case, the Court invalidated the Company's plan on the ground that it discriminated against employees on the basis of their sex—male—not on the basis of their non-pregnancy. The Court described the ultimate question for decision as "whether [Newport News] has discriminated against its male employees with respect to their compensation, terms, conditions, or privileges of employment because of their sex . . . ." 462 U.S. at 675. In so stating the issue, the Court expressly noted that, although the PDA

> makes clear that this language [of Title VII] should be construed to prohibit discrimination against a *female employee* on the basis of *her own pregnancy*, it did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female—which was already present in the Act. As we explain *infra* . . ., [Newport News'] plan discriminates against male employees on the basis of their sex.

Id. at 675-676 n.11 (emphasis added). The Court thus made clear at the outset that its holding in favor of male employees was not based on their non-pregnancy and confirmed the construction of the PDA set forth above—

that insertion of the language "because of pregnancy or on the basis of pregnancy" into the substantive provisions of Title VII extends protection only to pregnant women.[10]

The Court next explained that in enacting the PDA, Congress "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." *Id.* at 678. The Court thus made clear that the PDA stands for the principle that discrimination against *any* pregnant woman (not just a pregnant *employee*) because of her pregnancy constitutes discrimination on the basis of sex. *See id.* at 681 n.21 ("it would be anomalous to hold that Congress provided that an employee's pregnancy is sex-based, while a spouse's pregnancy is gender-neutral").

The Court then pointed out that a plan that provided full insurance coverage for husbands of employees, but excluded from coverage the cost of hospitalization of employees' wives on account of pregnancy, discriminated on the basis of the wife's sex. *Id.* at 684. Therefore, the Court concluded:

> And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.

Ibid. Finally, the Court reiterated its initial observation:

> By making clear that an employer could not discriminate on the basis of an employee's pregnancy, *Congress did not erase the original prohibition*

---

[10] By contrast, as discussed above, the prohibition of sex discrimination contained in Title VII protects both men and women. Significantly, the Court was not construing the PDA, but rather the prohibition against sex discrimination that has always been contained in Title VII, when it stated: "Male as well as female employees are protected against discrimination." 462 U.S. at 682, *citing* 42 U.S.C. § 2000e-2(a)(1).

against discrimination on the basis of an employee's sex.

Id. at 684-685 (emphasis added).

Newport News thus provides no support for petitioners' argument that the PDA prohibits discrimination in favor of pregnant women. Rather, the Court specifically described the Act as making "clear that it is discriminatory to treat pregnancy-related conditions *less* favorably than other medical conditions." *Id.* at 684 (emphasis added).

This Court did not hold that the plan in *Newport News* discriminated against male employees *because they were not pregnant.* To the contrary, the Court held that Newport News' plan discriminated against employees' wives *because they were pregnant.* Hence, the employees—their husbands--were discriminated against *because they were male.* The Court's decision thus clarifies that while the PDA was "intended to protect *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers" (*id.* at 681 (footnote omitted)), the only discrimination prohibited by the Act is discrimination *against* pregnant persons.

II. EVEN IF TITLE VII, AS AMENDED BY THE PDA, WERE INTERPRETED TO PROHIBIT AN EMPLOYER FROM PROVIDING DISABILITY LEAVE ONLY FOR PREGNANCY, THAT STATUTE WOULD NOT PREEMPT SECTION 12945(b)(2).

Even if Title VII, as amended by the PDA, were interpreted to prohibit employees from providing disability leave only for pregnancy, it would not preempt Section 12945(b)(2). Title VII and the Civil Rights Act of 1964 preempt only state laws that are inconsistent with federal law or that require acts unlawful under federal law. Under this strict standard, the statute should be invalidated only if an employer could not comply with both the federal and state statutes or if there were unequivocal evidence that the state legislature would not have enacted the statute had it been aware of the requirements of federal law.

First, employers clearly can comply with both statutes. Section 12945(b)(2) requires simply that employers provide a minimum level of benefits to pregnant employees. It is not inconsistent with federal law, nor does it require an act that is unlawful under federal law, because federal law does not preclude an employer from providing such benefits. Thus, even if providing benefits only to employees disabled by pregnancy were held to violate Title VII, Title VII would not invalidate those benefits, but would require the employer to provide equivalent benefits to employees disabled for other reasons in order to avoid discrimination. Second, there is absolutely no evidence, much less the unequivocal evidence required for preemption, that the California legislature would not have enacted the statute had it known that federal law would require equal benefits for all disabilities.

A. There Is A Strong Presumption Against Preemption In This Case.

1. *In enacting Title VII and the PDA, Congress intended to preserve state law.*

Although the Supremacy Clause invalidates state laws that "interfere with, or are contrary to the laws of Congress," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), the " 'exercise of federal supremacy is not lightly to be presumed.' " *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), *quoting Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952). *See also Louisiana Public Service Comm'n v. FCC*, No. 84-871 (U.S. May 27, 1986), slip op. 12. In determining whether federal law preempts state law, "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

In enacting Title VII, Congress intended not to preempt state law. To the contrary, Congress meant merely to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). This intent is made plain in the statutory language itself. Section 708 of Title VII provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7. More generally, Section 1104 of Title XI of the Civil Rights Act provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of the Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4.

These provisions strengthen the presumption that Title VII should not be construed to preempt a state statute. As this Court stated in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67 (1980): "Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory powers over discriminatory employment practices." In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101 (1983), the Court again acknowledged that "[s]tate laws obviously play a significant role in the enforcement of Title VII." The statutory scheme of Title VII envisions that the States will enact and enforce fair employment laws, and even encourages them to do so. *See, e.g., Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468-69 (1982) ("[s]tate anti-discrimination laws . . . play an integral role in the congressional scheme"); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 68.[11]

Congress's intent that Title VII not preempt state antidiscrimination measures is reiterated in the legislative history of the PDA. At various points in its debates and reports, Congress acknowledged that several States already had construed their fair employment practices laws "to prohibit sex discrimination based on pregnancy and childbirth." *See, e.g.*, Senate Report at 3, *reprinted in Leg. Hist.* at 40. Relying on 42 U.S.C. §§ 2000e-7 and 2000h-4, quoted above, Congress made clear that "[s]ince Title VII does not preempt State laws which would not *require* violating Title VII . . ., these States would continue to be able to enforce their State laws if the bill were enacted." Senate Report at 3 n.1 (emphasis added), *reprinted in Leg. Hist.* at 40 n.1.

2. Under the preemption standard applicable in this case, the state statute should be upheld unless employers could not reasonably comply with both the federal and state statutes or unless there is compelling evidence that the California legislature would not have enacted Section 12945(b)(2) if it had known the PDA would require equal treatment for disabilities unrelated to pregnancy.

These basic preemption principles establish a clear framework for analyzing the effect of the PDA in this case. Title VII creates a strong presumption in favor of concurrent federal and state regulation in the area of

---

[11] As the Court noted in *Shaw v. Delta Airlines, Inc.*, 463 U.S. at 101, the importance of state involvement in ensuring equal employment opportunity is indicated by the fact that, under Title VII, the federal government must defer to the States' enforcement of state fair employment laws.

civil rights, unless the state statute is flatly inconsistent with federal law. Thus, the preemptive shadow cast by the federal statute in this case is exceedingly narrow. Accordingly, if an employer can comply with both federal law and the state statute, the latter should be invalidated only if there is unequivocal evidence that the state legislature would not have enacted the state statute if it had known that Title VII would require equal benefits for those not expressly benefitted by the state statute.

Principles of federalism should restrain a federal court from modifying a state law unless such a modification is clearly required by federal law. In some instances, modification of a state statute is unavoidable. If, for example, a state classification is inconsistent with federal law because compliance with the state law prevents compliance with federal law, then a federal court must modify the state law and is presented with the difficult question whether to extend or nullify the benefits conferred under state law. A case in which both the federal law and the state statute can be followed, however, does not require a court to extend or nullify the state law. The court is required only to interpret the requirements of the federal statute. Although the court's interpretation might have the effect of extending the benefits conferred under state law, this result would follow *as a matter of federal law, not as a matter of state law.* The court need not redraft the state statute and thereby usurp a state legislature's prerogatives; rather, the court need only perform its customary function of construing federal law. Thus, if both state law and federal law can be followed, the two statutes can operate in a complementary fashion, which does not require a court to modify the state law in any respect.

This rule acknowledges the States' longstanding commitment to civil rights and respects the law-making prerogatives of the state legislatures. By permitting the

States to protect civil rights beyond the guarantees of federal law, the rule gives substance to the well-established presumption against preemption in this field. The rule also minimizes the usurpation of the prerogatives of state legislatures that is inherent in judicial invalidation of state law. Federal courts in particular embark on a sensitive and arduous task when they seek to divine the intent of a state legislature. The proposed rule reduces both the difficulty and the intrusiveness of the inquiry by narrowing the court's focus to a search for unequivocal evidence that the state legislature would not have enacted the law in question had it been aware of the consequences of federal law. Such a rule avoids placing a federal court in the unenviable position of second-guessing the state legislature, which may itself repeal or amend the statute if it deems such action appropriate in light of the requirements of federal law as interpreted by the court.

B. Nothing In The Language Or Legislative History Of Section 12945(b)(2) Warrants Preemption In This Case.

It is clear that an employer *can* comply with both the PDA and the requirements of Section 12945(b)(2). Section 12945(b)(2) simply requires a California employer to permit an employee who is disabled by pregnancy to take an unpaid leave of absence for the period of her disability, not to exceed four months. Nothing in the state statute prevents an employer from extending this same leave to employees who are disabled by conditions other than pregnancy. To the contrary, employers are free to extend the same treatment to disabilities unrelated to pregnancy, if they so desire or if this Court were to determine that Title VII so requires.

Title VII does not require that employers provide disability leave for pregnancy, but neither does it prohibit it; it merely requires nondiscrimination. Title VII gives rise to a conditional obligation; it does not prescribe what

disability benefits must be provided, but requires only that if employers provide benefits they do so on a nondiscriminatory basis. If a State imposes on employers obligations that are not required under federal law, such as the requirement of certain disability benefits, it may trigger that obligation of nondiscrimination under Title VII. Thus, if providing disability benefits only for pregnancy were to violate Title VII, then Title VII would require any employer that provides such benefits to provide disability benefits on a broad enough basis to avoid discrimination. The state law does not require discrimination; it merely triggers the obligation of nondiscrimination. Accordingly, by requiring employers to provide benefits for disability related to pregnancy, Section 12945 (b) (2) does not "require or permit the doing of any act that would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7. Thus, on its face, the California statute is not inconsistent with Title VII, as amended by the PDA.[12]

In addition, there is not a shred of evidence in the legislative history of Section 12945(b) (2) that suggests

---

[12] Petitioners and the United States have challenged this conclusion as inconsistent with Congress's intent, expressed in the legislative history of the PDA, not to interfere with an employer's decision whether, and at what level, to provide disability benefits for pregnancy. *See* Pet. Br. at 46-47; U.S. Br. at 26. Congress's concern, however, was only that the *PDA* not be construed as requiring certain levels of pregnancy benefits. Nothing in the legislative history suggests that Congress intended to bar the *States* from requiring certain levels of benefits for pregnancy-related disabilities. Even if petitioners were correct in arguing that the PDA requires the same treatment for non-pregnancy-related disabilities as for pregnancy-related disabilities, nothing would prohibit a State from requiring employers to provide a certain level of benefits for all disabilities. Because the State clearly could require a specific level of benefits for pregnancy-related disabilities as part of a uniform disabilities program, it also may do so in the context of Section 12945(b) (2) because employers may provide equal benefits for other disabilities if the PDA so requires.

that the California legislature would not have enacted the provision if it had known that, by so doing, employers would be required to provide leave for all comparable disabilities.[13] To the contrary, the legislative history of Section 12945(b) (2) reveals the California legislature's strong commitment to the preservation of that provision. The bill that contained Section 12945(b) (2) also included several other provisions concerning the treatment of pregnancy in the workplace. When the California legislature became aware that Congress likely would enact the PDA, the state body amended its proposed legislation to provide that, in the event the PDA were enacted, California employers covered by Title VII would not be required to comply with the state legislation *except for the unpaid disability leave provision. See, e.g.*, September 14, 1978, memorandum from the Department of Industrial Relations, Agriculture and Services Agency, to Assemblyman Howard Berman, sponsor of the California statute.[14]

Petitioners have cited no legislative history or other evidence that suggests that the California legislature would not have enacted Section 12945(b) (2) if it had thought that the PDA would require equal treatment for

---

[13] One committee amended the bill to require an employer to grant leave for pregnancy-related disabilities only when that employer has a leave policy for other disabilities. April 14, 1978, letter from Assemblyman Bill Lockyer, Chairman, Assembly Labor, Employment and Consumer Affairs Committee to Senator Bill Greene, Chairman, Senate Industrial Relations Committee. The amendment was not included in the final version of the bill. Its deletion shows that the legislature did not want to limit the availability of leave for pregnant employees to that provided in existing plans; it does not indicate that the legislature would have preferred *no* leave policy to one that extended to all disabilities.

[14] This Court's decision in *Gilbert* was the motivating force behind the California statute. *See, e.g.*, Enrolled Bill Report, *Agriculture and Services—Industrial Relations* (Sept. 11, 1978) at 1 ("This bill is an attempt to legislatively 'overrule' the decision of the United States Supreme Court in *General Electric Co. v. Gilbert* . . . .").

other disabilities. This omission is not an oversight by petitioners; there simply is no evidence of any such concern on the part of the California legislators. Petitioners thus cannot even begin to establish the compelling and unequivocal legislative intent that would be required to strike down the California statute under the applicable preemption analysis (*see* part II.A.2, *supra*).[15]

In these circumstances, where employers can comply with both Title VII and Section 12945(b)(2), they should be required to do so. Because there is no evidence that the California legislature would not have enacted the statute even if it had believed that unpaid leave would be required for all disabilities, the presumption in favor of preserving state law should restrain this Court from invalidating the statute.

---

[15] Petitioners and their *amici* also have relied on decisions rendered by some lower federal courts invalidating so-called "protective" legislation. *See, e.g., Homemakers, Inc. v. Division of Indus. Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976) (overtime premiums); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) (maximum hours and weightlifting restrictions); *Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal. 1972) (rest periods). As explained in *Homemakers*, the Ninth Circuit's refusal to extend to men the "benefits" of the "protective" legislation was "particularly warranted" by the conceded legislative intent that underlay those statutes—"to afford special protection for women employees" (509 F.2d at 23). In other words, the court explained in *Rosenfeld*, 444 F.2d at 1223, "women, considered generically, are not physically or biologically suited for [the] work." Section 12945(b)(2), by contrast, is based on no such outdated, stereotypical assumption that women cannot perform as well as men, but rather on the conceded fact (*see, e.g.*, A.C.L.U. Br. at 29) that women cannot work when they are disabled due to pregnancy. Finally, the *Homemakers* court noted that caution in extending a statute was particularly appropriate where doing so "would impose a sizeable economic burden on employers." 509 F.2d at 23. Significantly, the benefit involved in this case is *unpaid* leave.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

TODD D. PETERSON
BARBARA E. ETKIND
NANCY L. ZISK
ROSS, DIXON & MASBACK
2000 Pennsylvania Ave., N.W.
Suite 10800
Washington, D.C. 20006
(202) 828-4800
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

June 12, 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Petitioners,

v.

MARK GUERRA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

MARSHA S. BERZON
ALTSHULER & BERZON
177 Post Street, Suite 600
San Francisco, California 94108
(415) 421-7151

Attorneys for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	5
Introduction	5
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:

Aloha Airlines v. Director of Taxation, 464 U.S. 7 (1983)	7
Califano v. Goldfarb, 430 U.S. 199 (1977)	20
Craig v. Boren, 429 U.S. 190 (1976)	20
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)	17
Geduldig v. Aiello, 417 U.S. 484 (1974)	4
Gilbert v. General Electric Co., 429 U.S. 125 (1976)	11, 20
Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., 467 U.S. 622 (1984)	16
Malone v. White Motor Corp., 435 U.S. 497 (1978)	7
McLaughlin v. Florida, 379 U.S. 184 (1964)	20
Metropolitan Life Insurance Co. v. Massachusetts, —— U.S. ——, 105 S.Ct. 2380 (1985)	18
Michigan Canners & Freezers Assoc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461 (1983)	7
Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry, 692 P.2d 1243 (Mont. 1984)	19
Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1984)	20
Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963)	7
Shaw v. Delta Airlines, 463 U.S. 85 (1983)	*passim*
Thomas Publishing Co. v. Division of Human Rights, 456 F. Supp. 1104 (S.D. N.Y. 1978)	10

TABLE OF AUTHORITIES—Continued

	Page
Washington v. Davis, 426 U.S. 229 (1976)	20
Weinberger v. Weisenfeld, 420 U.S. 636 (1975)	20
Statutes:	
Cal. Gov't Code § 12945(b)(1)	13
Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq.	
§ 207(b), 42 U.S.C. § 2000a-6	10
§ 703 § 303, 42 U.S.C. § 2000e-2	11
§ 708, 42 U.S.C. § 2000e-7	2, 8, 12
§ 1104, 42 U.S.C. § 2000h-4	2, 8
Montana Maternity Leave Act, Mont. Code Ann. § 49-2-310 (1983)	18
Miscellaneous:	
H.R. 10144, 87th Cong., 2d Sess. (1962)	8
Legislative History of Titles VII and XI of Civil Rights Act of 1964	8
Legislative History of the Pregnancy Discrimination Act of 1978	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-494

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Petitioners,

v.

MARK GUERRA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed with the consent of the parties as provided in the Rules of this Court.

SUMMARY OF ARGUMENT

Both petitioners and the Ninth Circuit approach this case as if the California statute in dispute mandates that employers provide pregnant disabled workers with leave protection while denying such protection to other disabled workers. California, however, neither requires nor purports to protect from legal sanction an employment policy differentiating between pregnant workers and others with regard to disability leave. The question before this Court on this facial attack on the California pregnancy dis-

ability leave statute is, therefore, not whether an employment policy thus differentiating would violate Title VII, but whether California's statute is displaced by Title VII even though it does *not* command any employer to violate the federal statute.

I. The appropriate analytic starting place for addressing this question is the role for state employment regulation Congress preserved when it passed Title VII. Where a statute contains a provision expressly addressing a preemption question, that provision should ordinarily govern. Title VII does contain such a provision; it is broadly antipreemptive, displacing state law only when that law "purports to require or permit" a violation of Title VII. § 708 of Title VII, 42 U.S.C. § 2000e-7. Further, a second antipreemption section was included in the omnibus 1964 Civil Rights Act of which Title VII was a part. That section (§ 1104 of Title VII, 42 U.S.C. § 2000h-4) was included to reinforce the antipreemptive nature of the other sections of the Act, and thereby to emphasize that Congress intended to preserve a broad range of state authority over employment practices generally, and equal employment opportunity matters specifically.

In particular, Title VII clearly does not displace state laws simply because they are "inconsistent" with Title VII in the sense that they embrace a different vision of equal employment opportunity issues than does Title VII. Nor can the "permit" language of section 708 be read to invalidate any state law that fails to prohibit employment discrimination outlawed by Title VII: Since *every* state statute that does not simply mimic Title VII would fall into this category, to thus read the statute would be to swallow entirely the antipreemption intent that Congress clearly expressed. Rather, "permit" in section 708 must refer to statutes that purport expressly to recognize as valid employment policies violative of Title VII. Only statutes of this kind, or those that require an employer to violate Title VII, are void under the federal statute.

In applying these standards to the present case, we may assume that petitioners are correct: (1) that Congress in passing Title VII determined to mandate only equality of treatment, and not to require that any employee, pregnant or otherwise, be provided with disability leave or any other benefit; and (2) that Title VII as amended by the Pregnancy Discrimination Act of 1978 prohibits employers from providing protected disability leave to pregnant workers but not to other employees. Neither of these propositions demonstrates that the California law "requires or permits" a violation of Title VII: Clearly, while Title VII does not so require, an employer does not violate Title VII by providing disability benefits or leave to its employees, nor would a state law mandating disability leave for *all* employees violate Title VII. And while the state statute does not prevent employers from providing disability leave to pregnant employees only, it does not sanction such a policy in any way.

II. To this analysis two objections may be raised. The first is that the result of this approach, if petitioners are correct in their construction of Title VII, may be that California employers will have to provide *all* employees with disability leave protection. Since neither the state nor the federal statute so requires, it is said, it would be inconsistent with the intent of the state legislature and of Congress to construe the two statutes operating together to do so. But the question is not whether one or the other legislative body specifically intended the end result of joint regulation. *Whenever* both the state and federal governments are allowed to regulate on a particular subject, the conjunction of the two regulatory schemes can result in requirements different from, and broader than, either level of government independently intended. This result is simply the consequence of the decision of the federal government to allow some role for state action rather than to displace the state governments entirely from regulating in a given substantive area. Furthermore, in this instance the California

Legislature and Congress were each aware in general terms of the regulatory scheme concerning pregnancy intended by the other, and nonetheless went ahead with its own approach. Under these circumstances, the most appropriate conclusion about the "intent" of each legislative body is that it was determined to forward its own substantive policy whatever the result of the conjunction of federal and state policy might be. The preemption approach of this brief is consistent with *that* intent, since it both allows California to enforce its view that equal opportunity for pregnant workers demands that they be provided disability leave and protects the ability of the federal government to prevent discrimination based on pregnancy in the sense required by Title VII.

The second possible objection to the preemption analysis in this brief is that, under that approach, state statutes that protect some employees but not others on the basis of race or sex would also be left standing. Even if Title VII would then require employers to provide similar protections to employees of the other race or sex, the state statute would still be discriminatory as offering access to a state remedial scheme on a proscribed basis. What this observation actually demonstrates is that the issue in this case is at bottom not a Title VII preemption question but a constitutional problem. A statute otherwise similar to this one but protecting only one race or one sex would almost surely violate the equal protection clause, so that no Title VII question would arise. Unless reconsidered, however, this Court's opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974) forecloses any constitutional challenge in this case, and none has in fact been raised. Thus, to the extent that the approach of this brief appears to leave standing a discriminatory statute, that results flow not from any flaw in the preemption analysis but from present constitutional doctrine in the area of pregnancy.

ARGUMENT

Introduction

According to petitioners, the question presented in this case is whether Title VII preempts "a California law requiring employers to provide leave and reinstatement rights to employees disabled by pregnancy, but not to employees disabled by other medical conditions." Brief for the Petitioners ("Pet. Br.") at (i).[1] Because they frame the case in this way, petitioners concentrate on demonstrating that employers providing an unpaid dis-

[1] The assertion that California law "requires" employers to provide leaves for pregnancy disabilities and to deny them for other disabilities pervades both petitioners' argument and those of two of the amici appearing in their support. *See, e.g.*, Pet. Br. at 11 ("[t]here is no dispute that the California pregnancy disability law requires employers to treat pregnancy in a special way . . ."); *id.* at 42 ("[t]he California pregnancy disability law compels . . . special treatment [of pregnancy]"); Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioners at 7 (characterizing the California statute as one "mandating special treatment for employees disabled by pregnancy"); *id.*, at 16 (again portraying the California statute as one "requiring special treatment for pregnant workers"); *id.* at 18 (this case concerns "state action to mandate special treatment for one group on the basis of sex"); *id.* at 19 ("the discriminatory treatment required by the California pregnancy law"); *id.* at 20 "[t]he California pregnancy law fails . . . because it mandates a pregnancy-based classification which Title VII prohibits"); *id.* at 21 ("preferential treatment to women disabled by pregnancy [is] mandated by the state law"); Brief Amicus Curiae of the Chamber of Commerce of the United States In Support of the Petitioners at 2 ("[t]he question before this Court is whether the Supremacy Clause prohibits states from requiring special treatment of pregnant employees"); *ibid.* ("California mandates preferential treatment of pregnant employees"); *id.* at 3 (the California statute "put[s] employers in the untenable position of violating Title VII when attempting to comply with [the California] statute"); (*id.* at 4 "[t]he employment preference mandated by the California law . . . force[s] employers to violate federal law by requiring special treatment of employees disabled by pregnancy"); *id.* at 19 ("California's requirement of classifying workers on the basis of pregnancy and providing them different conditions of employment").

ability leave with job protection only to women disabled due to pregnancy or childbirth violate Title VII, as amended by the Pregnancy Discrimination Act of 1978 ("PDA").

The Court of Appeals accepted this basic approach to the case, differing with petitioners only on the merits of this Title VII issue involved: Like petitioners, the Ninth Circuit directed its inquiry to the question whether employment policies guaranteeing disability leave to pregnant women but not to other employees violate Title VII. On this question of Title VII substantive law, however, the court below disagreed with petitioners and held that under Title VII employers *can* justify more favorable treatment of pregnancy disabilities: As the Ninth Circuit read Title VII and the PDA, "[e]quality in the disability context compares coverage to actual need, not coverage to hypothetical identical needs." Pet. App. A-11. From the Ninth Circuit's conclusion that the California law simply requires an employment policy employers are free under Title VII to adopt on their own followed its holding that the state law is not displaced by the federal enactment.

The question actually before this Court, however, is quite different than either petitioners or the Ninth Circuit suggest. For the California statute neither requires California employers to provide disability leave to pregnant workers *only* nor purports to protect from legal sanctions a policy so limited. Rather, the statute under attack is one which mandates an employment policy for one group of disabled workers, while not addressing at all the question whether other disabled workers must be accorded similar protection. And, since this case involves a facial attack on the state statute (*see* Jt. App. 54), the question before the Court does not concern whether one or another employer's policy regarding disability leave and job protection is valid under Title VII, but whether the California statute is facially void for all purposes, as conflicting with the Supremacy Clause.

I.

In addressing this question, the appropriate analytic stating place is the general role Congress envisioned for the states when it enacted Title VII, rather than the particular substantive Title VII question involved in this case. As we demonstrate below, Congress embodied in Title VII a vital role for federal law, but one that deliberately preserved a broad range of action for the states.

This Court recently had occasion to explain that "[f]ederal law may pre-empt state law in any of three ways" —by "explicitly defin[ing] the extent to which it intends to pre-empt state law," by "indicat[ing] an intent to occupy an entire field of regulation," or by creating an actual conflict between federal and state law. *Michigan Canners & Freezers Assoc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1983). While, in all three instances, "[t]he purpose of Congress is the ultimate touchstone," (*Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963), quoted in *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)), explicit statutory language addressing the preemption question is a "far more reliable indicium of congressional intent with respect to state authority" than is an attempt to ferret out the implied intent of Congress. *Malone v. White Motor Corp., supra*, 435 U.S. at 505. Thus, where Congress has set out in the statute itself the principles governing the role for state action it envisions, those principles, and not others implied from the statute's structure or history, govern. *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 12 n.5 (1983); *see also, e.g., Shaw v. Delta Airlines*, 463 U.S. 85 (1983).

1. In Title VII, Congress was explicit about its intent regarding federal preemption:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty,

> or punishment provided by any present or future law of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.
>
> § 708, 42 U.S.C. § 2000e-7.

As noted in the report of the Congressional Committee that originated this language,[2] this section most accurately "might be called an anti-preemption provision." H.R. Rep. No. 1370 on H.R. 10144, 87th Cong., 2d Sess. (1962), Leg. Hist. at 2168. As such, the provision's primary purpose was to preserve to the states the right to pursue their own policies regarding regulation of employment practices generally, and promotion of equal employment opportunity particularly. *See Shaw v. Delta Airlines, supra*, 463 U.S. at 103 & n.24 (Title VII for the most part left state anti-discrimination laws and other statutes regulating employment practices " 'where they were before the enactment of Title VII' ").

Indeed, it was to assure that § 708 (and other non-preemptive provisions of the proposed omnibus Civil Rights Act) were construed so as to go far enough toward assuring the survival of state laws that Congress included a second "anti-preemption provision" in the 1964 Civil Rights Act of wheich Title VII was a part. That provision, § 1104 of the 1964 Civil Rights Act, 42 U.S.C. 2000h-4, was added in the House of Representatives. It originated because of a fear that the "in some of the titles of H.R. 7152 [the] attempt to preserve to individuals rights under State laws" was too "limited", and therefore "wholly inadequate." H.R. Rep. 914, *supra*

---

[2] The language of present § 708 of Title VII apparently began life as § 10(a) of the proposed Equal Employment Opportunity Act of 1962, H.R. 10144, reported out of the House of Representatives Committee on Education and Labor. *See* Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* ("Leg. Hist."), at 9, 2155; H.R. Rep. No. 914 on H.R. 7152, 88th Cong., 1st Sess. (1963), Leg. Hist. at 2057 (Additional Views of Hon. George H. Meader).

(Additional Views of Hon. George Meader), Leg. Hist. at 2057.

Rep. Meader, after expressing the fear quoted above in his additional views attached to the House Report, announced an intention to introduce an amendment "applicable to all the provisions of H.R. 7152 . . . which would . . . preserve the State statutes and . . . other ordinances adopted or to be adopted in the field of civil rights, unless they are in direct conflict with Federal laws on the same subject." H.R. Rep. No. 914, *supra*, Leg. Hist. at 2059. During the House debates, Rep. Meader did in fact introduce that amendment, in order to assure that "the State of California . . . or any State that has acted in this field in the past or may in the future [not] run the risk of having their . . . statutes held invalid because of the adoption of this civil rights bill." 110 Cong. Rec. 2788 (Feb. 10, 1964) (remarks of Rep. Meader).

The language of § 1104 as finally adopted differed somewhat from that first proposed by Rep. Meader: While the Meader amendment recognized an exception to its basic anti-preemptive thrust only for state statutes that involve such a "direct and positive conflict [with the federal Act] that the two cannot be reconciled or consistently stand together," the amendment ultimately adopted was a substitute amendment offered by Rep. Mathias, without objection from Rep. Meader. 110 Cong. Rec. at 2789. The substitute restated the exception to include state law provisions "inconsistent with any of the purposes of this Act, or any provision thereof." There is no indication, however, that the substitution altered the basic thrust of § 1104—to strengthen rather than weaken the anti-preemptive provisions in the remainder of the Act.

Thus, § 1104 in no way revises the "anti-preemption" nature of § 708, or expands the exceptions to the basic anti-preemption principle beyond those enunciated in § 708 itself. To the contrary, the more general section simply

cautions that the exceptions to the anti-preemptive thrust of § 708 (and to the other anti-preemptive provisions of the omnibus act, *see, e.g.*, § 207(b), 42 U.S.C. § 2000a-6) are to be read narrowly, so as to preserve to the states a broad range of authority over employment practices generally, and over state laws intended to promote equal employment opportunity particularly.

2. Section 708 excepts from its general anti-preemption principle only state laws "which purport[] to require or permit the doing of any act which would be an unlawful employment practice under this Title." Thus, contrary to petitioners' suggestion (*see e.g.*, Pet. Br. at 25, 33, 35), Title VII does *not* displace state laws simply because they are "inconsistent" with the federal statute in the sense that they are based upon equal employment opportunity policies different from that incorporated in Title VII.

This much at least is clear from *Shaw v. Delta Airlines, supra*. *Shaw* concerned in part the question whether New York could enforce a Human Rights Law condemning pregnancy discrimination as sex discrimination even though, during the period in question, "discrimination based on pregnancy was not sex discrimination under Title VII of the Civil Rights Act of 1964." *Shaw v. Delta Airlines, supra*, 463 U.S. at 88. While *Shaw* held that ERISA prevented New York from enforcing its Human Rights Law as it wished to during that period, it recognized that the State law was valid as far as Title VII is concerned:

> Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII . . . . Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit.
>
> *Id.* at 103.

See also Thomas Publishing Co. v. Division of Human Rights, 456 F. Supp. 1104 (S.D. N.Y. 1978) (rejecting

a Title VII preemption challenge to the same Human Rights Law involved in *Shaw*.) Thus, § 708 did not prevent New York from prohibiting employment practices disadvantaging pregnant workers even though Congress in Title VII had, according to this Court's decision in *Gilbert v. Electric Co.*, 429 U.S. 125 (1976), determined to allow such practices. Similarly, Title VII's anti-preemption section allows California to legislate a policy concerning equal opportunity for pregnant workers different from that Congress chose in Title VII, so long as that policy neither "requires" nor "permits" employers to violate the federal act.[3]

However Title VII as amended by the PDA is construed, the California pregnancy leave statute in no sense "requires" any employer to violate the federal statute: If the Ninth Circuit is correct (which we doubt) in reading the PDA to permit employment policies that provide more extensive job protection to pregnant workers than to other pregnant employees, an employer could comply with the state statute by assuring the unpaid disability leave it requires to pregnant workers only. If petitioners are correct in their contention that Title VII forbids

---

[3] The government, in its *amicus* brief, seeks to avoid this conclusion by reading Title VII as if its substantive provisions were directed at states rather than at employers. For example, the government argues that because the California law "selects out employees suffering pregnancy-related disabilities for certain guarantee employment-related benefits" (Brief for the United States as Amicus Curiae ("U.S. Br.") at 15), the statute "violates the requirement imposed by Title VII, as amended by the PDA, that pregnant employees 'be treated the same' as other persons not so affected 'for all employment-related purposes . . . .'" U.S. Br. at 16.

The problem presented by this case cannot, however, be solved by confounding the substantive prohibitions contained in § 703 of Title VII, as amended by the PDA, with the anti-preemption provision contained in § 708. It is the latter which describes what states may and may not do in their governmental role, while the former sets out standards of behavior for *employers* (including states *qua* employers.) *See also* pp. 20-21, *infra* (judged by constitutional standards, the state's pregnancy disability policy is valid).

them to provide leaves to pregnant workers and not to other disabled employees, nothing in the state statute prevents them from complying with Title VII as thus construed as well as with the state law.

The only question, then, is whether § 708 condemns California's pregnancy disability leave statute as a state law that "permits" a violation of Title VII. While "permit" can mean either "acquiescence, by failure to prevent" or "to expressly assent or agree to the doing of an act" (Black's Law Dictionary (1951) at 1298; *see also* The American Heritage Dictionary (1976) at 977 ("permit" means either to "tolerate" or "[t]o give consent" or "authorize")), the latter seems to be the more dominant use of the word (*see* Webster's New Collegiate Dictionary (1973) ("permit" means "to consent to expressly or formally" or "to give leave: authorize" or "to make possible")), and is clearly the sense in which Congress used the term in § 708 of Title VII.

To consider every state statute that fails to prevent discrimination condemned by Title VII as one that "permits" such discrimination would entirely swallow the anti-preemption principle that is at the heart of § 708. For *every* statute that does not parrot Title VII's substantive standards—including statutes having nothing whatever to do with equal employment opportunity[4]—in the broader sense "permits" violations of the federal employment discrimination law. Only if "permits" in § 708 is understood in its more usual and restrictive sense does Title VII remain "neutral on the subject of all employment practices it does not prohibit." *Shaw v. Delta Airlines, supra,* 463 U.S. at 103.

An example may help to clarify the proper reach of the "permit" language in § 708: Another part of the same

[4] *See Shaw v. Delta Airlines, supra,* 463 U.S. at 101 n.22 ("Title VII's saving clause [§ 708] applies to all state laws with which it is not in conflict, rather than just to nondiscrimination laws.")

California statute containing the pregnancy disability leave provision here under attack provides that ". . . [N]o employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth or related medical conditions for a period exceeding six weeks." Cal. Gov't Code § 12945(b)(1). This language affirmatively "permits" certain employer behavior, in the sense that it declares that such behavior shall be free of legal sanction. Yet, an employment policy providing general disability benefits or leave for ten weeks while limiting pregnancy disability benefits or leave to six weeks without doubt "would be an unlawful employment policy under [Title VII]." Title VII § 708, 42 U.S.C. 2000e-7. *See* Committee on Labor and Human Resource, United States Senate, *Legislative History of the Pregnancy Discrimination Act of 1978* (1979), at 96-112, 122-124 (Senate debate on a proposed amendment to the PDA to the same effect as Cal. Gov't Code Sec. 12945(b)(1), and Senate vote rejecting the amendment). As California itself apparently recognized,[5] the states six-week proviso would be preempted under § 708 of Title VII as a state statute that expressly purports to validate, although it does not require, an employment practice unlawful under Title VII.

Another example is contained in the legislative history of the PDA: Senator Williams, the Chairperson of the Senate Committee that reported out the PDA and one of its primary sponsors, stated during the Senate debate on the PDA that under Title VII,

> If there were clear conflicts on this issue and *the States attempted to permit what this legislation in*

[5] The California statute was first passed while the PDA was pending. The California legislature included in the original statute a section making all of its provisions *except* the four-month pregnancy disability leave protection here at issue inapplicable to employers covered by Title VII if the PDA should pass, and, once the PDA did pass, made the exclusion permanent. *See* Brief Amici Curiae of the National Organization for Women et al., at 16-17.

> *an amendment of the Civil Rights Act would prohibit,* obviously the Federal law would prevail, if there were a clear conflict.
>
> I would like to offer an example of a clear conflict. We define discrimination in this amendment, pregnancy and related conditions being sex discrimination. *If the negative were included in a State law,* that would be in absolute conflict with the Federal law, and the Federal law would prevail. . . . What I am stating is the most stark conflict, where it was *positively set* at the State level that this particular situation, pregnancy, is not discrimination. In the same context, we say it is discrimination and we would prevail at the Federal level.

Legislative History of the Pregnancy Discrimination Act of 1978, *supra*, at 79 (remarks of Sen. Williams, Sept. 16, 1977) (emphasis supplied).

In sum, under § 708, states are generally free to pursue a different vision of equal employment opportunity from that Congress selected. Only if the state's statute is, in Senator Williams' words, in "clear conflict" with the federal enactment in the sense that it either requires employers to violate federal law or purports to insulate them from legal sanctions is that freedom limited by the supremacy of federal law.

3. In applying these standards to this case, we may assume for present purposes that the petitioners are correct in their two basic propositions about the substantive decisions Congress made when it passed the PDA. The first such proposition is that in enacting Title VII Congress intended only to assure equality between pregnant workers and other employees, and not to require that any employer provide any employees, pregnant or otherwise, with disability leave. The second is that Title VII as amended by the PDA does not allow an employer to adopt employment policies that benefit pregnant workers but not other disabled employees. Neither of these propositions is fatally inconsistent with the California pregnancy

leave statute, given the federal-state relationship incorporated in Title VII.

While Title VII does not mandate any particular level of benefits, that is precisely because the federal enactment is a limited one, directed at assuring equality and unconcerned with the substantive level of *any* employment emolument or condition. That Congress was careful in enacting the PDA to stress that "the PDA does not require employers to provide disability leave or any type of disability benefit to pregnant employees" (U.S. Br. at 13) thus does not forbid the states from doing so. For example, a state statute mandating disability benefits for *all* employees is not displaced by Title VII, as *Shaw v. Delta Airlines* makes clear. In short, while Congress decided in the PDA to pursue a policy that stopped short of assuring employment security to any workers, pregnant or otherwise, it did not preclude the states from doing otherwise.

Moreover, the state statute neither requires nor purports to insulate from legal attack an employment policy that denies workers generally the same leave protection the state guarantees to disabled pregnant workers. Rather, the policy embodied in the state statute is that *at least* pregnant workers must have a reasonable disability leave. While the state "permits" employers to deny similar leaves to other disabled workers in the sense that it fails to prevent them from doing so, that only demonstrates at most an indifference to the question of equality in this regard. Just as § 708 of Title VII protects from federal preemption a vast range of other state statutes that are simply indifferent upon the validity of employment policies that would violate Title VII, so it permits California to enforce its pregnancy disability leave statute.

II.

To this analysis two objections may be, and to some degree have been, raised.

1. The first is that the result of this approach—again, assuming that the petitioners are correct, and the Ninth Circuit incorrect, about the nature of the equality guarantee incorporated in the PDA, a question the Court need not address directly in this case—may be that employers in California will be obliged under Title VII to provide all disabled employees with leave protection equivalent to that guaranteed to pregnant disabled employees by the state statute. Since neither the state nor the federal statutes independently so require, it is said, the two together may not be construed to do so.

Contrary to petitioners' suggestion and that of the amici supporting petitioners' position, the propriety of such a substantive result may not be resolved by focusing upon the individual intent of either the California Legislature or Congress when passing their respective pregnancy statutes. *Whenever* both the states and the federal government are allowed to legislate on a particular subject, the conjunction of the two sets of regulations will have a result different from, and broader than, either governmental level independently intended.[6] And, as this Court has recognized in other preemption cases, the fact that the interaction of a federal and a state statute may lead to an interdependent result different from those Con-

[6] An example may sharpen this point. In *Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co.*, 467 U.S. 622 (1984), the federal statute provided a time-limited procedure to govern abandonment of railroad lines; state law permitted ordinary condemnation proceedings to go forward after the federal procedure was completed. The conceded result of the Court's decision that the federal scheme did not displace the state condemnation procedure was to give shippers or potential purchasers two "bites at the apple" in establishing the value of abandoned railroad lines. There was a consequent prolonging of proceedings beyond that contemplated in either the federal or state statutory scheme. 467 U.S. at 635-636. Neither the state legislature nor Congress specifically "intended" this duplicative scheme; it was simply the consequence of the duplication of regulation that resulted from Congress' more general intent to legislate in the area of rail line abandonment without displacing state action.

gress or the state legislature independently prescribed is simply one possible effect of a Congressional decision to allow a role for state enactments, rather than to displace all state activity in a given substantive area.[7]

For example, in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the state required uniformity of pricing in situations in which the federal Robinson-Patman Act does not. The oil companies contended that the Maryland statute "may cause them to violate the Robinson-Patman Act," (437 U.S. at 131) because, under the Robinson-Patman Act, the prohibition against price discrimination does not stop at state lines.

The Court's opinion recognized that:

> The [state] statute may require that a voluntary allowance that legally could have been confined to the Baltimore area be extended to Salisbury. We may then assume, *arguendo*, that the Robinson-Patman Act could require a further extension of the allowance into the neighboring state.
>
> 437 U.S. at 131 n. 22.

This result would not have come about had either the state or the federal statute been operating independently. In particular, Maryland certainly did not intend to require that oil companies extend their discount prices to neighboring states. Nonetheless, this Court, cautioning that "the 'teaching of this Court's decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exists,' " held that the Maryland statute "does not create any irreconcilable conflict with the Robinson-Patman Act." 437 U.S. at 130, 131 n. 22. *See*

[7] Thus, despite petitioners' contention to the contrary (Pet. Br. at 43-48), the cases inquiring into a state's intent to determine whether extension of an *invalid* statute is an appropriate remedy have no relevance under our approach. Rather, our point is that the state statute is *not* invalid, and that if disability leave ultimately is determined to be due to all employees, that will be because of an interpretation of Title VII, and not of the state statute.

also, e.g., Metropolitan Life Insurance Co. v. Massachusetts, —— U.S. ——, 105 S. Ct. 2380, 2396-99 (Massachusetts authority to set minimum terms of employment is not preempted by the fact that, under federal law, employers whose employees are represented by an exclusive bargaining representative may be compelled to "bargain up" from those minimum terms, with a possible resulting level of benefits or wages beyond those either the state or the federal law would have created acting independently.)

Moreover, in this instance each legislative body—the California Legislature and the Congress—was aware in at least general terms of the regulatory scheme regarding pregnancy in the workplace enacted by the other, and nonetheless went ahead with its own approach. The two statutes—the California pregnancy statute of which the statute now under attack was part, and the PDA—proceeded through the legislative process at approximately the same time. California, apparently recognizing that many of its provisions would be preempted by Title VII as amended by the PDA, expressly exempted employers covered by Title VII from all portions of the California statute *except* the guarantee of a reasonable, unpaid disability leave for pregnant workers. *See* Brief for the National Organization for Women et al. at 14-17; *see also* n.5, *supra*. Conversely, the Congress that enacted the PDA was specifically aware that "several State legislatures . . . have chosen to address the problem by mandating certain types of benefits for pregnant employees" (Legislative History of the Pregnancy Discrimination Act of 1978 at 67 (remarks of Sen. Javits, Sept. 8, 1977)), and noted, in particular, the existence of a Montana statute that is similar to the California statute here under attack. H. R. Rep. No. 95-948, on H.R. 6075, 95th Cong., 2d Sess. (1978), at 11, Legislative History of the Pregnancy Discrimination Act of 1978, *supra*, at 157; *see* Montana Maternity Leave Act, Mont. Code Ann.

§ 49-2-310 (1983); *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry*, 692 P.2d 1243 (Mont. 1984), *appeal docketed* No. 84-1545.

Under these circumstances, the most appropriate conclusion is that the "intent" of each legislative body was a determination to forward its own substantive policy, whatever the result of the conjunction of state and federal requirements might be. The analysis presented in Part I, *supra*, allows both the state and the federal governments to pursue its own policy: Under that approach, the state's decision that equal employment opportunity for women workers requires at a minimum a reasonable pregnancy disability leave, with job protection, is given force along with the federal government's decision (assuming, with petitioners, that such a decision was made in enacting the PDA) that pregnancy disability must be treated the same as other disability, rather than either favored or disfavored. Thus, the understanding of Title VII preemption principles presented above does not distort the fundamental intent of either the state legislature or Congress, and should not be disapproved on that basis.

2. The second possible objection to the preemption analysis presented in Part I, *supra*, is that, as applied to Title VII generally rather than to the PDA particularly, that analysis would appear to leave standing clearly discriminatory state laws. For example, a state law providing minimum wage protection to whites but not to blacks might, under our analysis, be valid under Title VII; even if one assumes that under Title VII an employer would be obliged to provide for black employees the same wages paid to white workers pursuant to state law, such a state law indubitably discriminates on the basis of race by affording only whites, and not blacks, access to the remedial scheme provided by state law.

Rather than demonstrating a flaw in our analysis, however, this example simply shows that state statutes of the kind at issue in this case at bottom present constitu-

tional issues concerning application of the Equal Protection Clause, not Title VII supremacy clause problems. Thus, the statute hypothesized above would almost certainly be invalid under the Equal Protection Clause, so that no Title VII issue would ever arise. *See, e.g., Washington v. Davis*, 426 U.S. 229, 242 ("racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations"); *McLaughlin v. Florida*, 379 U.S. 184, 191-92. Similarly, it is extremely unlikely that a state could justify under the equal protection standard applicable to gender-based classifications a statute assuring disability leave generally to women but not to men. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *see also, e.g., Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

In this case, however, the Equal Protection Clause appears to be no barrier. Unless reconsidered,[8] this Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974) forecloses any contention that the pregnancy-based distinction embodied in the California enactment is unconstitutional.[9] For, under Geduldig, a "legislative classification concerning pregnancy is [not] a sex-based classification . . . . [a]bsent a showing that [the] distinction[] involving pregnancy [is a] mere pretext designed to effect an invidious discrimination against one sex or another." 417 U.S. at 496 n. 20. Rather, ordinarily "lawmakers are constitutionally free to *include* or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Ibid.* (emphasis supplied).

[8] We continue to believe, for substantially the same reasons that led Congress to overturn this Court's construction of Title VII in *Gilbert v. General Electric Co., supra* (*see Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-682 (1983) & sources cited in n.17), that *Geduldig* was wrongly decided.

[9] Thus, as the government notes in its brief, the reason "this case does not present the constitutional issue whether a state or federal law singling out pregnant female employees for guaranteed or preferential benefits would violate equal protection [is] no doubt [that] the argument is foreclosed by this Court's decision in *Geduldig*. . . ." U.S. Br., at 17.

In short, the preemption analysis presented in this brief does not lead to anomalous results. Instead, it confines the role of Title VII preemption to its proper sphere—that is, determining whether a particular state intervention in the employment relationship is within the narrow range of such activity Congress meant to displace when it enacted Title VII. Whether the state statute in question impermissibly favors pregnant employees by providing state protection denied other employees (*see* n.3, *supra*) is a separate constitutional issue that Title VII does not address. Thus, it is ultimately the constitutional principles this Court applies to pregnancy-based discriminations, not any pre-emption principles, that permit California to enforce its decision to protect only pregnancy disability leaves.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

MARSHA S. BERZON
ALTSHULER & BERZON
177 Post Street, Suite 600
San Francisco, California 94108
(415) 421-7151
Attorneys for Amicus Curiae

AMICUS CURIAE

BRIEF

No. 85-494

(15)

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL.,
Petitioners,

v.

MARK GUERRA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMICI CURIAE STATE OF CONNECTICUT, CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, CONNECTICUT PERMANENT COMMISSION ON THE STATUS OF WOMEN, STATE OF HAWAII, STATE OF MONTANA, AND STATE OF WASHINGTON

JOSEPH I. LIEBERMAN
Attorney General of the State of Connecticut
CLARINE NARDI RIDDLE
Deputy Attorney General of the State of Connecticut
30 Trinity Street
Hartford, Connecticut 06106
Tel. (203) 566-2026
Attorneys for the Amici Curiae State of Connecticut and Connecticut Permanent Commission on the Status of Women

(continued)

3 copies

Printed by
Brescia's Printing Services
66 Connecticut Boulevard
East Hartford, CT 06108
528-9029

PHILIP A. MURPHY, JR.*
Connecticut Commission on
Human Rights and
Opportunities Counsel
90 Washington Street
Hartford, Connecticut 06106
Tel. (203) 566-7061
*Attorney for the Amicus Curiae
Connecticut Commission on
Human Rights and
Opportunities*

CORINNE K.A. WATANABE
Attorney General of the State of
Hawaii
830 Punchbowl Street
Honolulu, Hawaii 96813
Tel. (808) 548-4372

MICHAEL GREELY
Attorney General of the State of
Montana
Office of the Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620
Tel. (406) 444-2026

KENNETH O. EIKENBERRY
Attorney General of the State of
Washington
Temple of Justice
Olympia, Washington 98504
Tel. (206) 753-6245

On the Brief:
DEBORAH R. GREEN
Connecticut Commission on
Human Rights and
Opportunities Attorney
BRIAN J. COMERFORD
Assistant Attorney General of
the State of Connecticut

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

TITLE VII DOES NOT PREEMPT A STATE LAW WHICH ACTS TO PROTECT PREGNANCY DISABLED WORKERS FROM LEAVE POLICIES DENYING THEM EQUAL EMPLOYMENT OPPORTUNITIES 5

A. TITLE VII'S PREEMPTION OF STATE LAW IS NARROW 5

B. TITLE VII DOES NOT PROHIBIT EMPLOYERS FROM PROVIDING WORKERS DISABLED BY PREGNANCY WITH AN UNPAID LEAVE OF ABSENCE 6

1. Prior To Passage Of The Pregnancy Discrimination Act Of 1978, Title VII Clearly Prohibited Facially Neutral Leave Policies Which Deprived Pregnancy Disabled Workers Of Employment Opportunities 7

2. The State Law Is Not Preempted By The Pregnancy Discrimination Act Of 1978 10

C. THE STATE LAW IS DISTINGUISHABLE FROM STATE PROTECTIVE STATUTES WHICH HAVE BEEN HELD TO VIOLATE TITLE VII 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: **Page(s)**

Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981) 8, 9

California Federal Savings and Loan v. Guerra, 758 F.2d 390 (9th Cir. 1985) 3, 16

Connecticut v. Teal, 457 U.S. 440 (1982) 7, 14

Dothard v. Rawlinson, 433 U.S. 321 (1977) 6, 7, 9

Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963) 6

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 3, 9, 11, 13, 14

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6, 7, 8, 14

Homemakers, Inc. of Los Angeles v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 163 (1976) 16

Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978) 16

Mitchell v. Board of Trustees of Pickens County School District, 599 F. Supp. 582 (4th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979) 8, 9

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 8, 9, 11, 12, 13, 14, 16

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 103 S. Ct. 2622 (1983) 7, 9

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) 15

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Shaw v. Delta Air Lines, 463 U.S. 85 (1983) 5

STATUTES

Federal:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e- *et seq.* (1976), as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k) . . . . . *passim*

Title XI of the Civil Rights Act of 1964, 42 U.S.C. 2000h- 4 5

State:

California Government Code § 12945 (b)(2) . . . . . *passim*

Other States:

Connecticut Fair Employment Practices Act *Conn. Gen. Stat.* §§ 46a-60 *et seq.* 1

REGULATIONS

Federal:

29 C.F.R. § 1604.10 . . . . . 12, 13

State:

2 California Administrative Code, § 7286.7a 6

Congressional Bills, Reports: **Page(s)**

H.R. Rep. No. 238, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137 14

H.R. Rep. No. 948, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749 ... 11, 12, 13

S. Rep. No. 331, 95th Cong., 1st Sess., (1977), *reprinted in* Senate Comm. on Labor & Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978, 38 (1980) 12

INTEREST OF AMICI CURIAE AND PARTY SUPPORTED

This brief *amici curiae* is being submitted with the consent of the parties and in accordance with Rule 36.2 of the Rules of this Court. The brief is filed in support of the respondents.

The Connecticut Commission on Human Rights and Opportunities (hereinafter "CHRO") is the civil rights law enforcement agency for the State of Connecticut. As such, it is charged with enforcement of Connecticut's fair employment practices law, *Conn. Gen. Stat.* § 46a-60 *et seq.* These statutes contain provisions which require, *inter alia*, that employers not terminate or refuse to hire an individual because of her pregnancy, that employers grant employees a reasonable leave of absence for pregnancy disability and that they, at the end of that leave, permit such employees to return to their former jobs or to ones substantially similar unless it is impossible or unreasonable for the employer to do so. *Conn. Gen. Stat.* §§ 46a-60(a)(7)(A), (B) and (D). Clearly, these Connecticut statutes are similar in many respects to *Cal. Gov. Code* § 12945 (hereinafter the "State Law,") which is at issue in this case. Therefore, the decision in this case as to whether or not the State Law is preempted by Title VII will have a substantial impact on CHRO's ability to enforce Connecticut law.

Pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), CHRO is designated a deferral agency for charges filed under Title VII. CHRO is therefore the primary enforcement agency for Title VII rights in Connecticut. A decision holding that strict equality of treatment for pregnant employees is all that is required or permitted by Title VII would seriously impair CHRO's ability to safeguard the employment opportunities of pregnant workers, a protected class under both Connecticut law and Title VII. Therefore, CHRO seeks to present to the Court its views on these important issues.

Recognizing the importance of eradicating sex discrimination from the workplace, the Attorney General of the State of Connecticut, on his own behalf, and on behalf of the State of Connecticut, has a strong interest in the effective enforcement of both Federal and State civil rights laws in order to remedy existing discrimination and to prevent future acts of discrimination. The *amicus* Connecticut Permanent Commission on the Status of Women, appearing herein through the Attorney General of the State of Connecticut, has an equally strong interest in eradicating sex discrimination in employment particularly as it may affect employment opportunities for qualified women.

Other States have joined in this brief. They are similarly motivated by a desire to protect the scope of the state law and Title VII enforcement for which they are responsible.

SUMMARY OF ARGUMENT

The question before the Court is whether or not Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, as amended by the Pregnancy Discrimination Act, 42 U.S.C. 2000e(k) (hereinafter "PDA") preempts the State Law. Congress did not intend that Title VII exclusively occupy the field of discrimination law. The several states are free to pass laws regulating discriminatory conduct as long as those laws are not inconsistent with the purposes of the 1964 Civil Rights Act and do not require or permit the doing of any act which would violate Title VII.

The petitioners accept this standard for preemption but apply it incorrectly. They assert that the State Law must be invalidated because the protection it affords to pregnant workers is inconsistent with Title VII's purpose. Petitioners' assertion is incorrect because, as the Ninth Circuit Court of Appeals stated in its decision in this case, the purpose of Title VII is the achievement of equal employment opportunity for workers who are protected under it, including those who become pregnant. As prior court decisions, Equal Employment Opportunity Commission guidelines and common sense indicate, an inadequate leave policy for employees disabled by pregnancy will inevitably result in loss of employment opportunities for these workers. The State Law, which protects the employment opportunities of workers disabled by pregnancy, furthers Title VII's purpose and is consistent with it.

The issue of whether workers with other temporary disabilities are also adversely affected by inadequate leave policies is not relevant to a determination of this case. Congress has not amended Title VII to protect workers suffering from disability in general but has, in response to this Court's decision in *General Electric v. Gilbert,* 429 U.S. 125 (1976), focused its protection on pregnancy and its attendant medical conditions. Since pregnancy discrimination is sex discrimination under Title VII, no further comparison of the

relative needs for disability leave of men or women need be made to validate the State Law. Persons disabled by pregnancy need unpaid leave if their employment opportunities are to be preserved. Therefore, a requirement that such leave be provided is clearly consistent with the purpose of Title VII as amended by the PDA.

Petitioners also claim that the State Law requires or permits the doing of an act prohibited by Title VII. The claim that the State Law requires conduct prohibited by Title VII is easily laid to rest. The State Law affirmatively mandates up to four months of unpaid leave for employees actually disabled by pregnancy. However, it does not prohibit employers from providing the same protection to employees disabled by other conditions. Therefore, even if Title VII were to be deemed to require equality of treatment with regard to unpaid leave, the State Law neither prohibits such equality nor excuses noncompliance with any additional Title VII requirements. Therefore it is not preempted.

Pregnancy disability is specifically protected under Title VII. An employer's reasonable accommodation of this disability with an unpaid leave does no more than is necessary to preserve the employment opportunities of pregnant workers. Therefore, the State Law requires employers to take action which comports with, rather than runs counter to, the requirements of Title VII as amended by the PDA.

The State Law does not conflict with the purpose of the 1964 Civil Rights Act. Further, it neither requires nor permits the doing of any act that would violate Title VII. Therefore it is not preempted by Title VII.

ARGUMENT

TITLE VII DOES NOT PREEMPT A STATE LAW WHICH ACTS TO PROTECT PREGNANCY DISABLED WORKERS FROM LEAVE POLICIES DENYING THEM EQUAL EMPLOYMENT OPPORTUNITIES.

A. TITLE VII'S PREEMPTION OF STATE LAW IS NARROW.

The limited authority to preempt state law under Title VII is found in two statutory provisions. Section 1104 of Title XI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4, provides that the federal legislation is not meant to exclude state laws on the same subject matter. Under this section, a provision of state law is preserved "unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4. Similarly, Title VII's preemption provision saves any state law concerning the same subject matter "other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7. It is clear from this statutory language that Title VII does not exclusively occupy the field of anti-discrimination law and that the States are free to enact legislation concerning that subject. As this Court recently noted in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)

> . . . . Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, . . . Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit.

463 U.S. at 103. Therefore, in order to be preempted by Title VII, the State Law would have to mandate the doing of an act which is counter to the purpose of or is prohibited by Title

VII. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963) (A State Law will be preempted if compliance with it and with federal regulation is a "physical impossibility").

The State Law requires employers to grant employees disabled by pregnancy an unpaid leave of absence with position held unless the employer can establish a bona fide occupational qualification that justifies the failure to do so.[1] In order for the State Law to be preempted, it must be illegal under Title VII for an employer to provide workers disabled by pregnancy with this leave.

B. TITLE VII DOES NOT PROHIBIT EMPLOYERS FROM PROVIDING WORKERS DISABLED BY PREGNANCY WITH AN UNPAID LEAVE OF ABSENCE.

Title VII has long been understood to protect the employment opportunities of pregnant workers. This was true both before and after the passage of the PDA.

[1] The bona fide occupational qualification defense incorporated in the State Law is analogous to the business necessity defense available in disparate impact Title VII cases. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) this Court ruled that a facially neutral policy with a disparate impact on a protected group cannot stand unless the employer can establish "a manifest relationship" between job performance and the policy and a "genuine business need" for the policy. *Griggs v. Duke Power Co.*, 401 U.S. at 432. This Court also defined the business necessity defense in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). "Business necessity is the touchstone, a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." *Dothard v. Rawlinson*, 433 U.S. at 331 n.14. Title 2, Division 4, of the California Administrative Code, § 7286.7(a), states that an employer may establish his defense of a practice which excludes protected class individuals if he proves "that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question . . ." As the quoted language indicates, the two standards are compatible.

1. Prior To Passage Of The Pregnancy Discrimination Act Of 1978, Title VII Clearly Prohibited Facially Neutral Leave Policies Which Deprived Pregnancy Disabled Workers Of Employment Opportunities.

The State Law neither prohibits nor mandates an equal leave policy for all employees who become disabled. It does require establishment of a leave policy under which pregnant workers will not suffer a loss of employment opportunities because of absence occasioned by pregnancy disability, unless business necessity is shown.

There is nothing new or violative of Title VII in the State Law's emphasis on equality of employment opportunity for protected class members. The requirement of equal employment opportunity is a central aspect of Title VII enforcement. Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), makes it an unlawful employment practice for an employer to

> limit, segregate, or classify his employees or applicants for employment in any way which *deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee* because of such individual's race, color, religion, sex, or national origin. (emphasis added)

This Court has recognized that Title VII prohibits facially neutral policies which have a disparate impact on the employment opportunities of members of one sex. *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (females); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (exclusion of pregnancy benefits from spousal coverage held discriminatory against male employees). *See also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (race discrimination). A facially neutral policy which has a disparate impact on members of a class protected under Title VII will violate Title VII unless it is justified as a business necessity. *Connecticut v. Teal*, 457 U.S. 440, 446–447 (1982); *Griggs v. Duke Power Co.*, 401 U.S. at 424.

Employment policies which provide no, or inadequate, leave for disability have been held to adversely affect the employment opportunities of pregnant women. *Abraham v. Graphic Arts International Union*, 660 F.2d 811, 817 (D.C. Cir. 1981). In *Abraham*, the court held that an employer's policy limiting sick leave to ten days per year would violate Title VII unless it were justified by business necessity. The court noted, "[o]ncoming motherhood was virtually tantamount to dismissal . . . In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter [fn. omitted]" 660 F.2d at 819.

In reaching its decision, the *Abraham* court relied on this Court's decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), a case decided before the PDA was enacted. In *Satty*, one of the employment policies at issue treated absence occasioned by pregnancy disability as a voluntary leave of absence. Any employee, regardless of sex, who sought reemployment following a voluntary leave, lost all accumulated seniority. This made reemployment difficult for the employee to obtain since she could be placed in a position only if no current employee bid on it. The Court found that although the policy was sex neutral on its face, it violated Title VII under the reasoning of *Griggs*. It held that § 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), does not permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role in the scheme of human existence. *Nashville Gas v. Satty*, 434 U.S. at 142.

Similarly, in *Mitchell v. Board of Trustees of Pickens County School District*, 599 F.2d 582 (4th Cir. 1979) *cert. denied* 444 U.S. 965 (1979), the court relied on the adverse impact theory expounded in *Griggs* to invalidate as violative of Title VII an employment policy which denied reemployment to any teacher who could not make a commitment to work for a full year. The court found that this policy was not a business necessity and had a disparate impact on pregnant

workers. The court therefore ruled that the policy denied employment opportunities to women in violation of §§ 703(a)(1) and (2) of Title VII. *Mitchell v. Board of Trustees of Pickens County School District*, 599 F.2d at 585–587.[2]

Thus, case precedent clearly indicates that facially neutral policies which cause workers disabled by pregnancy to lose employment opportunities are prohibited sex discrimination under Title VII and can be justified only by a showing of business necessity. As this Court's decision in *Nashville Gas v. Satty* indicates, this was true even before the PDA was enacted. It was true even when pregnancy discrimination was deemed not to be, *per se*, sex discrimination under Title VII. *See Nashville Gas v. Satty*, 434 U.S. at 140; *General Electric Co. v. Gilbert*, 429 U.S. at 136.

It should be remembered that the State Law mandates only that employees disabled by pregnancy be granted up to four months unpaid leave, position held. Thus, its purpose and effect is to protect workers disabled by pregnancy from personnel policies which would work to deprive them of employment because of circumstances that would never affect non-pregnant employees. Prior to passage of the PDA, this protection was certainly permitted by and consistent with the purpose of Title VII, since Title VII clearly prohibited an employer from having a leave policy which would adversely impact the employment opportunities of pregnant workers. See *Nashville Gas Co. v. Satty*, 434 U.S. at 142; *Abraham v. Graphic Arts International Union*, 660 F.2d at 817.

---

[2] The Fourth Circuit Court of Appeals did not rely on an actual statistical showing of disparate impact. It noted that in a case where it can be shown that a facially neutral policy "must in the ordinary course have a disparate impact on a protected group . . ." it is not necessary to show an actual disparate effect on the employer's work force. *Mitchell v. Board of Trustees*, 599 F.2d at 585 n.7. *See Dothard v. Rawlinson*, 433 U.S. at 330; *Nashville Gas v. Satty*, 434 U.S. at 142.

California need not prove the discriminatory impact of any particular employer's unpaid leave policy in order to establish that the State Law and Title VII have the same purpose. It is clear that Title VII mandates equal employment opportunity and has long prohibited unpaid leave policies which adversely affect the employment opportunities of pregnant workers. The State Law also regulates unpaid leave policies and has the same purpose as does Title VII. The purpose and effect of the State Law is equal employment opportunity for pregnant workers. Clearly, the State Law is consistent with Title VII and should not be deemed preempted because of any claimed incompatibility of purpose.

2. The State Law Is Not Preempted By The Pregnancy Discrimination Act Of 1978.

Did the PDA, passed to protect pregnant workers, act inadvertently to remove an important protection available to those workers under Title VII by making it illegal to provide them with a leave that preserves their employment opportunities? Clearly, the answer must be no.

The PDA contains two clauses. The first redefines the terms "because of sex" or "on the basis of sex" as used in Title VII to include, *inter alia*, "because of or on the basis of pregnancy, childbirth or related medical conditions." Under this clause, persons disabled by pregnancy have, by definition, protected class status under Title VII and are no longer required to establish an impact on women in general in order to make out a claim.

Thus, the first clause of the PDA makes it abundantly clear that policies which tend to deprive pregnancy disabled employees of employment opportunities are prohibited. Inserting the language of the first clause, "because of or on the basis of pregnancy, childbirth or related medical conditions" into the sections setting out what is an unfair employment practice under Title VII, particularly §§ 703(a) (1) and (2),

illustrates this point. The State Law cannot be deemed preempted by this clause.

The second clause of the PDA states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . ." This section requiring equality of treatment in fringe benefit programs should not be read so broadly that it eliminates the general protection available to all employees covered by Title VII, a protection that the first clause of the PDA makes specifically available to pregnancy disabled workers.

Two Supreme Court decisions provided impetus for the passage of the PDA. This Court's decisions in *General Electric v. Gilbert* and *Nashville Gas Co. v. Satty* made a distinction between benefits and burdens. In the *Satty* case, a policy which tended to deny pregnant workers employment opportunities was deemed an impermissible burden on women. In *Gilbert,* the denial of paid health insurance benefits for pregnancy was not deemed to be discrimination. Instead, the Court placed emphasis on the equal value of the benefit plan as a whole to both men and women. The legislative history of the PDA indicates Congressional concern with this distinction. The House Report found that these decisions of the Court "left both employers and employees in the untenable position of guessing, without any judicial guidance, whether the courts would apply the 'benefits' or the 'burdens' label to a particular policy." H.R. Rep. No. 948, 95th Cong., 2d Sess., 2, 3, *reprinted in* 1978 U.S. Code Cong. and Ad. News 4749,4751.

The statutory requirement of the PDA that pregnancy be treated the same for purposes of benefits under fringe benefit plans was meant to eliminate the distinction created by *Gilbert* and to assure that nondiscrimination on the basis of pregnancy would be required with regard to fringe benefits as well as with regard to employment opportunities. *See*

S. Rep. No. 331, 95th Cong., 1st Sess., 2-3, (1977), *reprinted in* Senate Comm. on Labor and Human Resources, 95th Cong., 2d Sess., Leg. Hist. of the Pregnancy Discrimination Act of 1978, 38, 39-40 (1980); H.R. Rep. No. 948, 95th Cong., 2d Sess., at 2-4, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 4750-4752. The section-by-section analysis of the Act *supports* this view.

> Section 1. This section amends section 701 of the Civil Rights Act of 1964 by adding a new subsection 701(k) which broadens the definition of sex discrimination in the act to include discrimination on the basis of pregnancy, childbirth or related medical conditions. It also makes clear that fringe benefit programs must treat women affected by those conditions equally to other employees on the basis of their ability or inability to work, except in regard to benefits for abortions not necessary to preserve the life of the mother; and that nothing in section 703(h) of the act be interpreted to permit otherwise.

H.R. Rep. No. 948, 95th Cong., 2d Sess., at 13, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 4761.

It is clear that Congress intended to preserve the disparate impact analysis developed in the *Satty* Case. Congress indicated that it meant to incorporate the approach taken in the EEOC Guidelines on Sex Discrimination, specifically 29 C.F.R. § 1604.10. H.R. Rep. No. 948, 95th Cong., 2d Sess., at 2, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 1750. Since 1972, § 1604.10 has contained the following provision:

> Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

1604.10(c). This section of the guidelines, an executive branch statement predating the *Satty* case, was readopted by the EEOC in 1979, after the passage of the PDA.

The House Report pertaining to enactment of the PDA specifically states that, "by making clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need *in most instances* to rely on the impact approach." (emphasis added). H.R. Rep. No. 948, 95th Cong., 2d. Sess., at 3, *reprinted in* 1978 U.S. Code Cong. and Ad. News 4751. Thus, an impact analysis would no longer be needed for cases concerning disability benefit plans such as the one at issue in *Gilbert*. However, facially neutral policies which constitute "built-in headwinds" for female workers should not be exempted from Title VII's coverage. As the House Report notes:

> Although recent attention has been focused on the coverage of disability benefit programs, the consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the childbearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.

H.R. Rep. No. 948, 95th Cong., 2d. Sess., at 6-7 (1978). The PDA was passed to prohibit discrimination on the basis of pregnancy, childbirth and related medical conditions, "and to ensure that working women are protected against *all forms of employment discrimination based on sex*." (emphasis added). H.R. Rep. No. 948, 95th Cong., 2d. Sess., at 3, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 4751.

In view of the stated goal of Title VII with regard to the protection of female workers, it is illogical to read the PDA so as to prohibit the State Law's requirement of a leave policy which will not have a disparate impact on workers disabled by pregnancy. To do so is to presume that Congress meant to elevate form, facial neutrality, over substance, discriminatory effect, regardless of the consequences. Ever since the *Griggs* decision, the opposite approach has been well accepted by both Congress and the courts. As the Supreme Court has noted, Congress has given favorable recognition to the disparate impact approach.

> The legislative history of the 1972 amendments to Title VII . . . demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the court in *Griggs*. Both the House and Senate Reports cited *Griggs* with approval, the Senate Report noting: 'Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs.' S. Rep. No. 92-415, p.5 (1971).

Connecticut v. Teal, 457 U.S. at 447, n.8. *See also* H.R. Rep. No. 238, 92nd Cong., 1st Sess., 1, 8121, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2144, 2156.

A leave policy or a statute which grants workers disabled by pregnancy a reasonable leave with a right to reemployment does not grant women preferential treatment. Rather, it strives to make women equal in the workplace by removing for them a serious threat of job loss stemming from a specific disability which men will never face. *See Nashville Gas v. Satty*, 434 U.S. at 142. Any claim that this constitutes preferential treatment prohibited by Title VII ignores the disparate impact and equality of opportunity principles long a part of Title VII law as well as the expressed legislative purpose and intent of the PDA.

There is no express language in either the PDA or its legislative history which would indicate legislative intent to limit Title VII by making females less protected than are other protected groups. Clearly, the PDA should be read to permit the continued application of the disparate impact theory to sex discrimination claims. Read in this way, the PDA is compatible with the requirements of the State Law.

Further, even if the second clause of the PDA is read to require only equality of treatment and not equality of opportunity, the States would remain free to require that leave policies be free of discriminatory effect on pregnancy-disabled workers.[3] This is all that the State Law does. It does not prohibit extension of such a leave policy to all workers. It does not attempt to shield California employers from any additional requirements that Title VII may be deemed to contain. It is clearly possible for a California employer to comply fully with both the State Law and Title VII, even if the second clause of the PDA is read to require an equal unpaid leave policy for all disabled employees of a covered employer. Therefore, the State Law is outside the limited range of Title VII's preemption provision and cannot be deemed preempted by any part of Title VII, including the second clause of the PDA.

C. THE STATE LAW IS DISTINGUISHABLE FROM STATE PROTECTIVE STATUTES WHICH HAVE BEEN HELD TO VIOLATE TITLE VII.

The State Law is not analogous to state protective statutes which have been held to violate Title VII. Those laws required employers to accord special treatment to female employees. *See e.g. Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) (invalidating California statutes limiting the number of hours of work that could be required of female employees and the amount of weight that women could be

---

[3] The narrow scope of Title VII's preemption provision must be remembered. *See* pgs. 5–6 *supra*.

required to lift on the job) and *Homemakers, Inc. of Los Angeles v. Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 163 (1976) (striking California statutes which required employers to pay overtime to women in circumstances when overtime wages would not be required for male employees). These statutes conflicted with Title VII because they required employers to alter terms and conditions of employment solely on the basis of presumptions concerning female employees. A restriction on the amount of weight that a female employee can be asked to lift is based on a generalization about the physical strength of women. It therefore denies strong women employment opportunities and forces employers to exclude women from certain jobs solely because of their sex. This denial of employment opportunities clearly violates the Title VII requirement that employment decisions be based on individual qualifications and not on generalizations about women as a group. *See Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978).

In contrast, the State Law does not require employers to act on generalizations or presumptions about women. Rather, it requires employers to grant an unpaid leave with right of reemployment to employees for the period of time, not to exceed four months, that the employees are actually disabled by pregnancy. This does not require that employers grant all women preferential treatment. It only requires employers to accommodate the actual pregnancy disability of employees. The effect of the State Law is not discrimination against women or men. Rather, it results in the elimination of discrimination against women by tending to make their chances for long term employment equal to that of men. *See Nashville Gas Co. v. Satty*, 434 U.S. at 142. The State Law does not require employers to accommodate all disabilities of women while failing to consider those of men. It only requires accommodation of the one disability which is unique to women and which men will never encounter in the course of their careers. Therefore, it tends to place women and men on an equal footing and is in accordance with, rather, than in conflict with, Title VII's requirement of equal employment

opportunity for all covered workers, including those disabled by pregnancy.

Since the State Law does not require employers to violate Title VII, there is no need to extend its protection to other disabilities in order to save it from preemption. The State Law does not require anything that is prohibited by Title VII and is therefore valid as written.

CONCLUSION

For the foregoing reasons, the Ninth Circuit correctly decided that Title VII does not preempt California Government Code § 12945(b)(2). The State Law, which mandates a reasonable unpaid leave for actual pregnancy disability, requires nothing that Title VII prohibits and is preserved rather than preempted under the explicit language of Title VII as amended by the PDA. Therefore, the court should affirm the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

JOSEPH I. LIEBERMAN
Attorney General of the State of Connecticut
CLARINE NARDI RIDDLE
Deputy Attorney General of the State of Connecticut
BRIAN J. COMERFORD
Assistant Attorney General of the State of Connecticut
30 Trinity Street
Hartford, Connecticut 06106
Tel. (203) 566-2026
Attorneys for the Amici Curiae State of Connecticut and the Connecticut Permanent Commission on the Status of Women

(continued)

PHILIP A. MURPHY, JR.
Counsel of Record
DEBORAH R. GREEN
Connecticut Commission on Human Rights and Opportunities
90 Washington Street
Hartford, Connecticut 06106
Tel. (203) 566-7061
Attorneys for the Amicus Curiae Connecticut Commission on Human Rights and Opportunities

CORINNE K.A. WATANABE
Attorney General of the State of Hawaii
830 Punchbowl Street
Honolulu, Hawaii 96813
Tel. (808) 548-4372
Attorney for the Amicus Curiae State of Hawaii

MICHAEL GREELY
Attorney General of the State of Montana
Office of the Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620
Tel. (406) 444-2026
Attorney for the Amicus Curiae State of Montana

KENNETH O. EIKENBERRY
Attorney General of the State of Washington
Temple of Justice
Olympia, Washington 98504
Tel. (206) 753-6245
Attorney for the Amicus Curiae State of Washington

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

In The

Supreme Court of the United States

October Term, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,
Petitioners,

v.

MARK GUERRA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF EQUAL RIGHTS ADVOCATES, THE CALIFORNIA TEACHERS ASSOCIATION, THE NORTHWEST WOMEN'S LAW CENTER, THE SAN FRANCISCO WOMEN LAWYERS ALLIANCE, AMICI CURIAE

Of Counsel:

Herma Hill Kay
Boalt Hall School Of Law
University of California,
Berkeley
Berkeley, CA 94720

Judith E. Kurtz
Counsel of Record

Nancy L. Davis
Marjorie Fujiki
Shauna I. Marshall
Equal Rights Advocates
1370 Mission Street
Fourth Floor
San Francisco, CA 94103
(415) 621-0505

Attorneys for *Amici Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Interest of *AMICI CURIAE*	1
Summary of Argument	1
Argument	4
I. THE PREGNANCY DISCRIMINATION ACT IS CONSISTENT WITH STATE LAWS WHICH ENSURE EQUALITY OF OPPORTUNITIES TO WOMEN DISABLED DUE TO PREGNANCY	4
A. In Order To Create Equal Employment Opportunities, Women's Procreative Role Must Be Recognized	5
B. Unlike State Protective Laws Preempted By Title VII, California Government Code §12945 (b) (2) Ensures Equality Of Opportunity	7
II. THE PREGNANCY DISCRIMINATION ACT REQUIRES EMPLOYERS TO PROVIDE ADEQUATE DISABILITY LEAVE TO EMPLOYEES DISABLED DUE TO PREGNANCY	10
A The Pregnancy Discrimination Act Reverses *Gilbert:* It Does Not Require That All Disability Leave Policies Provide Identical Coverage For Disabilities Related To Pregnancy And Disabilities Unrelated To Pregnancy	11
B. An Employer's Failure To Provide Adequate Leave To An Employee Disabled By Pregnancy Has An Illegal Adverse Impact	14

TABLE OF CONTENTS—Continued

Page

C. The Pregnancy Discrimination Act Prohibits Policies Which Have An Adverse Impact On Pregnant Women And Does Not Require Identical Treatment Of Employees Disabled Due To Pregnancy And Those Disabled Due To Other Causes 17

D. Cal Fed's Failure To Provide Adequate Pregnancy-related Disability Leave Violates Title VII 20

III. THE PREGNANCY DISCRIMINATION ACT LEAVES STATES FREE TO ENACT STATUTES REQUIRING EMPLOYERS TO GRANT ADEQUATE PREGNANCY-RELATED DISABILITY LEAVE 23

A. When Congress Enacted The Pregnancy Discrimination Act, It Endorsed Existing State Laws Requiring Employers To Grant Pregnant Employees Reasonable Leaves Of Absence 24

B. Because Congress Approved Employer Policies Which Provide Benefits To Pregnant Workers, States Are Free To Adopt Statutes Requiring Such Employer Policies 26

C. California Government Code §12945(b)(2) Is Consistent With The Broad Goals Of Title VII 27

CONCLUSION 29

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Pages

CASES

Abraham v. Graphic Arts Int'l Union, 660 F.2d 811 (D.C. Cir. 1981) 15, 22

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 9

Bradwell v. Illinois, 83 (16 Wall.) U.S. 130 (1873) 2

Burns v. Rohr Corp., 346 F.Supp. 994 (S.D. Cal. 1972) 8

deLaurier v. San Diego Unified School District, 588 F.2d 674 (9th Cir. 1978) 15

Dothard v. Rawlinson, 433 U.S. 321 (1977) 11, 22

Frontiero v. Richardson, 411 U.S. 677 (1973) 9

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 3, 12, 14, 19

Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976) 12, 13

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 3, 11, 14, 16

Homemakers, Inc. of L.A. v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976) 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 14

Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry, 692 P.2d 1243 (Mont. 1984), *appeal docketed*, No. 84-1545 (U.S. March 27, 1985) 24

TABLE OF AUTHORITIES—Continued

Pages

Mitchell v. Board of Trustees, 599 F.2d 582 (4th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979) 15, 22

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 15, 20

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) 12, 14, 18, 19

United Steelworkers of Amer. v. Weber, 443 U.S. 193 (1979), *rehg. denied*, 444 U.S. 889 22

STATUTES

FEDERAL:

42 U.S.C. §2000e *et seq.* (1964) (Title VII of the Civil Rights Act of 1964) ..... *passim*

42 U.S.C. §2000e(k) (1982) (The Pregnancy Discrimination Act) ..... *passim*

Fed.R.Evid., Rule 201 22

STATE:

California Government Code §12945(b)(2) (West 1980) ..... *passim*

Conn. Gen. Stat. §46a-60 (1985) 25

Mont. Code Ann. §49-2-310 (1985) 24

TEXTS

S. Kamerman, A. Kahn, and P. Kingston, *Maternity Policies and Working Women* (1983) 21

1 A. Larson, *Employment Discrimination* (1985) 11

TABLE OF AUTHORITIES—Continued

Pages

MISCELLANEOUS

H.R. Rep. No. 948, 95th Cong., 2d Sess. (1978) reprinted in 5 U.S. Code Cong. & Ad. News 4749 *et seq.* (1978) 13, 16, 19, 21, 24, 26, 28

S. Rep. No. 331, 95th Cong.. 1st Sess. (1977) 13, 16, 24, 27

123 Cong. Rec. (1977) 12, 26

124 Cong. Rec. (1978) 26

29 C.F.R. §1604.10(c) (1985) (Equal Employment Opportunity Commission's Guidelines on Discrimination Based on Sex) 16

Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berk. W.L.J. 1 (1985) 6

Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929 (1985) 17

Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 Colum. L. Rev. 690 (1983) 18, 19

BRIEF FOR EQUAL RIGHTS ADVOCATES, ET AL., AS AMICI CURIAE

This brief amici curiae is filed with the written consent of all parties pursuant to Rule 36. The letters of consent have been filed with the Clerk.

INTEREST OF AMICI CURIAE

The statement of interest of Amici Curiae Equal Rights Advocates, Inc., the California Teachers Association, the Northwest Women's Law Center, and the San Francisco Women Lawyers Alliance, is included in the Appendix. This brief is filed in support of respondents Mark Guerra, *et al.*

SUMMARY OF ARGUMENT

California Government Code § 12945(b)(2) which requires employers to grant up to a four month leave to employees disabled due to pregnancy is consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). In fact, the federal and state laws have the identical goal of ensuring equal employment opportunities to pregnant women employees.

California Federal Savings and Loan Association ("Cal Fed") violated both statutes when it denied Lillian Garland, a receptionist/PBX operator, a leave of absence for the period of time she was disabled from doing her job because of her pregnancy. Approximately 3 months after Garland began her pregnancy leave, she informed

Cal Fed that she was able and willing to return to her job. However, her position had been permanently filled and no similar position was available at that time. Only after 7 months had passed was Garland able to return to work as a receptionist.

All women who become pregnant while employed face the same possibility of termination as Garland in the absence of a guaranteed pregnancy disability leave. In essence, any woman who gives birth to a child faces termination at a time in their lives when their careers are being built and when family income is most dependent on their contributions. Nonetheless, until recently, society has assumed that a woman's primary role and proper occupation in life is to be a wife and mother and not to be a person who works outside her home.[1] Over the years, this myth has been debunked both by statistics that prove that women participate in large numbers in the labor force and by women's consistent efforts to end sex discrimination in employment.

Both Title VII and the state law were enacted to guarantee that women who bear children do not suffer discrimination. In order to ensure equal employment opportunities the state and the federal laws implicitly recognize the real differences in the procreative roles of men and women. These biological reproductive sex differences must be taken into account if the goal of equal employment opportunity for pregnant women is to be attained. Failure to accommodate the real physical sex-based differ-

---

1 *See, e.g.*, Bradwell v. Illinois, 83 (16 Wall.) U.S. 130 (1873) (Bradley J., concurring).

ences during the limited period of time that women and men are affected differently denies reality and results in women being disadvantaged in their employment opportunities.

California's statute requiring reasonable unpaid disability leave prevents employers like Cal Fed from enforcing disability leave policies that result in women being denied equal employment opportunities because of pregnancy-related disabilities. The goal of the state statute is to ensure that women who enter the paid work force are placed on the same footing as men. Because the California law creates equality it is unlike state protective laws preempted by Title VII. Protective legislation is based on false stereotypical notions of female roles, while the state statute is based on a recognition of the real biological sex differences accompanying reproductive roles.

Likewise, the passage of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982) ("PDA"), clarified that pregnant women may not be denied equal employment opportunities. The PDA was enacted to counteract the Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that a denial of benefits for pregnancy-related disabilities did not constitute sex discrimination. In doing so, Congress clarified that pregnancy discrimination is sex discrimination and claims of pregnancy discrimination must be judged by the standards normally applicable to claims of sex discrimination. Thus policies neutral on their face which adversely affect pregnant women are violative of Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Policies like Cal Fed's which result in potential termination for any woman who becomes pregnant, adversely affect women who alone become pregnant. Because the PDA forbids such policies, a law like California Government Code § 12945(b)(2) which eliminates the adverse impact of inadequate disability leave policies is in harmony with the federal law. In fact, legislative history of the PDA shows that Congress specifically intended to leave states free to enforce statutes identical to California's.

—o—

ARGUMENT

I. THE PREGNANCY DISCRIMINATION ACT IS CONSISTENT WITH STATE LAWS WHICH ENSURE EQUALITY OF EMPLOYMENT OPPORTUNITIES TO WOMEN DISABLED DUE TO PREGNANCY

California Government Code § 12945(b)(2) is consistent with and not preempted by Title VII. In enacting the state statute, the California legislature properly exercised its authority to pass laws not inconsistent with federal law.

The state statute provides, in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
>
> . . . .
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . . .
>
> . . . .

> (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. . . .

California Government Code § 12945(b)(2) (West 1980). The requirement that California employers grant unpaid pregnancy-related disability leave for up to four months does not conflict with Title VII or its amendment, the Pregnancy Discrimination Act. In fact, the state and Title VII have identical goals.

In order to end discrimination against pregnant women, the real biological sex differences in the reproductive roles of men and women must be taken into account. During the period of time a woman is pregnant she may not be disadvantaged as compared to a man who has also engaged in reproductive conduct but does not suffer any physically disabling consequences. Because the California law recognizes the real biological differences between men and women, it does not resemble laws preempted by Title VII which are based on false, stereotypical notions of women's proper roles.

A. In Order To Create Equal Employment Opportunities, Women's Procreative Role Must Be Recognized

Men and women who work outside their homes and engage in reproductive conduct face very different consequences if that conduct results in pregnancy. A woman will, by necessity, be forced to leave her work for some period of time, while a man is not affected in his work life. This simple biological sex difference must be taken into account if the goal of equal employment opportunity is to be reached.

Cal Fed asks the Court to ignore biological, reproductive sex differences and to treat women and men iden-

tically solely according to their ability or inability to work, despite the fact that only women who engage in reproductive conduct will be disadvantaged in their employment. This approach is flawed because it both denies the reality of women's reproductive role and ignores the male reproductive role.

This Court should also reject the approach that distinguishes between women and men based on women's *capacity* to become pregnant. This approach compares people based on the possibility that women may become pregnant. However, not all women become pregnant during their lives. Differentiating women who are not pregnant from men who are not pregnant is illogical and demonstrates that the classifications are not divided exclusively by sex. Such a comparison creates an overbroad category composed of all fertile women despite the fact that all fertile women do not become pregnant.

The doctrinal approach which takes into account the real biological differences between men and women at the point in the reproductive cycle when women and men are affected differently in their capacity to work is an episodic approach.[2] Using the episodic aproach creates equality between the sexes, while recognizing biological reproductive sex differences that "appear only when the reproductive

---

[2] Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berk. W.L.J. 1 (1985). (Hereinafter "Kay".) In her article, Professor Kay analyzes philosophical and legal approaches to discrimination against pregnant women. She posits the episodic doctrine that should be used to analyze pregnancy discrimination cases because it takes into account the reality of the biological sex differences that distinguish women from men, but only at the time that those differences have been realized: *i.e.*, at the time a woman has actually become pregnant.

function is manifested through a pregnancy that resulted from the reproductive behavior of both sexes.'"[3] During this period, both pregnant women and men who have engaged in reproductive conduct are different from both nonpregnant women and men who have not engaged in reproductive conduct. Pregnant women are similarly situated to men who have engaged in reproductive behavior, and these are the groups which should be compared in order to determine if there is discrimination. It is unjust and discriminatory against pregnant women to allow employers to disadvantage women during this short period of time in which women and men who have engaged in reproductive conduct have different physical needs.

B. Unlike State Protective Laws Preempted By Title VII, California Government Code § 12945(b)(2) Ensures Equality of Opportunity

Understanding the proper comparison to be made in examining pregnancy discrimination claims clarifies why the California law creates equality and does not resemble legislation which discriminates on the basis of sex. Discriminatory, protective legislation preempted by Title VII does not distinguish between men and women who engage in reproductive conduct, but classifies men and women based on stereotypical notions of their sex roles. It fosters inequality in the absence of true difference, while California Government Code § 12945(b)(2) promotes equality in the presence of a genuine physical distinction.

---

[3] Kay at 24 (footnote omitted).

While any man or woman *could* benefit from some form of disability leave broadly comparable to the pregnancy leave allowed women by the California statute, it is obvious that leave granted for disabilities related to reproductive conduct is only needed by women who have engaged in reproductive activity, and not by men.

The fact that men who engage in reproductive conduct do not need a pregnancy leave differentiates California Government Code § 12945(b) (2) from the protective legislation invalidated under Title VII. (*E.g., Homemakers, Inc., of L.A. v. Division of Industrial Welfare,* 509 F.2d 20 (9th Cir. 1974), *cert. denied,* 423 U.S. 1063 (1976) (striking down a statute providing overtime pay to women only); *Burns v. Rohr Corp.,* 346 F. Supp. 994 (S.D.Cal. 1972) (invalidating a law requiring rest periods for women only).)

The purpose of state protective statutes is to shield women from exposure to men's work and its imputed dangers; the intent of the California statute, in sharp contrast, is to make it possible for women who bear children to compete equally with men in the workplace. The assumptions underlying the protective rules, as the *Burns* court points out, *id.* at 996, are false social stereotypes—*e.g.,* that women are inherently weaker than men. But the basis for the California statute is the recognition of how women's unique reproductive role affects them in the workplace.

One further objection to the California statute must be answered, *i.e.,* the charge that this law, like protective legislation, will result in employers not hiring women and will make men envious, thereby putting women "not on a

pedestal, but in a cage." *Frontiero v. Richardson,* 411 U.S. 677, 684 (1973). First, it is difficult to see how women could be in more confining a cage than they are at present: it is no consolation for a woman without the right to pregnancy leave to be able to obtain a job when she has no way to retain her job once she becomes pregnant. Second, it has been illegal to refuse to hire a woman because of her sex for over 20 years. Employers cannot begin to discriminate with impunity because they fear a woman may have the right to a pregnancy leave. That rationale would lead to the absurd conclusion that eliminating discrimination should be avoided because of the potential negative effects.[4] Third, many men have working wives on whose incomes the family relies, especially at a time when their families are expanding. These men will not envy women who are granted disability leaves, but will be relieved that their wives' opportunities have not been harmed.

The California statute is not protective legislation because, by guaranteeing equal opportunity to all workers who bear children, it merely prevents women from suffering an additional burden no man would ever suffer. Unlike protective legislation it neither restricts women in their employment opportunities nor extends additional benefits to women workers unavailable to similarly situated male workers.

---

[4] For example, the same argument could be made in regard to the holding in Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) requiring nondiscrimination in pension plans. This could result in fewer job opportunities for women because an employer will have to pay more pension dollars for women than for men.

II. THE PREGNANCY DISCRIMINATION ACT REQUIRES EMPLOYERS TO PROVIDE ADEQUATE DISABILITY LEAVE TO EMPLOYEES DISABLED DUE TO PREGNANCY

When Cal Fed refused to place Lillian Garland in a job comparable to the one she held prior to taking her maternity leave, it not only violated the California statute requiring employers to grant up to four months of unpaid leave to women disabled due to pregnancy, but it violated Title VII as well.

The history of the passage of the Pregnancy Discrimination Act shows that it was designed to remedy underinclusive employer disability benefit plans that exclude pregnancy-related disabilities from coverage. To do this, Congress made classifications based on pregnancy equivalent to sex discrimination and mandated that these underinclusive programs cover pregnancy on the same basis as any other disability.

The issue in this case does not invole an otherwise comprehensive disability benefits plan which excludes pregnancy; rather it involves a policy which adversely affects women because it is inadequate to accommodate the needs of pregnant women. This plan, which has the appearance of neutrality, results in the denial of equal employment opportunities — in violation of Title VII — to women who are disabled due to pregnancy.

The argument that the PDA requires employers to provide *identical* treatment to men and women in relationship to their ability or inability to work must fail because it would adversely affect the class of women the PDA was explicitly designed to protect — pregnant women.

As Professor Larson, a leading commentator on employment discrimination points out:

> Clearly, if an employer says, "All pregnant employees will be fired," there is sex differentiation. It is really no different in effect to say "No maternity leave will be granted". . . . Some leave accompanying childbirth is an accepted modern necessity, and a policy of denying it, with discharge as the alternative, is tantamount to a policy of discharge for pregnancy . . . It is sex differentiation *not* to offer to women a benefit denied to men—maternity leave. The reason is that this "inequality" is necessary to provide substantial equality of employment opportunity.

1 A. Larson, *Employment Discrimination* § 38.22 at 8-31 - 8-32 (1985) (emphasis in original).

There is nothing in the PDA itself or its legislative history which indicates that Congress intended to limit its protection merely to require identical treatment of all disabled workers. Identical treatment of disabled workers would eliminate Title VII's prohibition against sex discrimination as set forth in *Griggs v. Duke Power Co.*, 401 U.S. 424, *supra*, and *Dothard v. Rawlinson*, 433 U.S. 321 (1977), making policies neutral on their face illegal if they have an adverse impact on women. Under the adverse impact theory, policies which result in unequal employment opportunities for pregnant women violate Title VII.

A. The Pregnancy Discrimination Act Reverses Gilbert: It Does Not Require That All Disability Leave Policies Provide Identical Coverage For Disabilities Related To Pregnancy And Disabilities Unrelated To Pregnancy

Nothing in the PDA prohibits a law like California Government Code § 12945(b)(2). In direct response to

the Supreme Court decision in *General Electric Co. v. Gilbert, supra,* 429 U.S. 125, which held that under Title VII employers were free to exclude pregnancy-related disabilities from their otherwise comprehensive employee insurance compensation programs, Congress enacted the PDA as an amendment to Title VII. *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669 at 670 (1983). Congressional intent to overrule *Gilbert* is stressed repeatedly in the PDA's legislative history, as the following statement of Senator Javits makes clear:

> This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in [*Gilbert*] . . . I hope the Senate will recognize the remedial purpose of the bill and approve it as reported from the . . . Committee.

123 Cong. Rec. 29387 (1977).

That the reversal of the *Gilbert* decision was Congress' aim has important consequences. The focus on *Gilbert* accounts for the emphasis placed on disability insurance payments and the relative lack of discussion of other employment practices, including unpaid leave. In reversing *Gilbert,* Congress implicitly endorsed the reasoning of the trial court which had originally decided *Gilbert.*[5] H.R.

---

[5] Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974), *aff'd,* 519 F.2d 661 (4th Cir. 1975), *rev'd,* 429 U.S. 125 (1976).

Rep. No. 948, 95th Cong., 2d Sess. 2 (1978)[6] and S. Rep. No. 331, 95th Cong., 1st Sess. 2 (1977). The *Gilbert* district court held that an employer could not exclude pregnancy-related disabilities from otherwise inclusive benefits packages. At the same time it recognized that men and women are different because of their different procreative roles. Thus the lower court found that the aim of providing equality of opportunity was met in that case by providing comprehensive disability coverage despite the argument that paying more for women's pregnancy-related disabilities was "more favorable" treatment for women. The district court found that the appropriate standard to assess a potential violation of Title VII is whether the end result would be equality.

> If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual equality as is within its power to produce.

Gilbert v. General Electric Co., supra, 375 F. Supp. at 383.

Not a single statement in the legislative history expresses disapproval of a state law requiring that employers grant reasonable *unpaid* pregnancy leave. Rather, the overwhelming body of the PDA's legislative history is concerned with determining the cost to employers of providing medical and hospital insurance coverage to pregnancy-related disabilities. *See, e.g.,* S. Rep. No. 331, 95th Cong., 1st Sess. 9-11 (1977); H.R. Rep. No. 948, 95th Cong., 2nd Sess. 9-12 (1978). Congress was operating against a back-

---

[6] Reprinted in 1978 U.S. Code Cong. & Ad. News 4749 *et seq.*

ground where employers were regularly singling out pregnancy for exclusion from disability insurance plans. However, the rejection of the *Gilbert* decision was an implicit approval of an analysis which focuses on providing equal employment opportunity for pregnant women regardless of how other employees are treated.[7] Likewise, a state law which requires the same result is appropriate.

B. An Employer's Failure To Provide Adequate Leave To An Employee Disabled By Pregnancy Has An Illegal Adverse Impact

An employer violates Title VII either by intentionally applying its policies unequally to the detriment of employees of one sex, *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), or by evenly applying facially neutral policies having an adverse impact on employees of one sex. *Griggs v. Duke Power Co., supra,* 401 U.S. 424. Such a facially neutral policy, though seemingly nondiscriminatory, violates Title VII when it has an adverse effect on a protected class and is not justified by business necessity. *Id.* Thus, an employer can violate the PDA by enforcing an inadequate disability leave policy that impacts more harshly upon women than men, even though it applies this facially neutral policy in an evenhanded manner.

In *Newport News, supra,* the Court explicitly found the PDA was enacted in order "to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision." 462 U.S. at 679. Before *Gilbert,* courts had employed disparate impact analysis in deciding cases claiming illegal pregnancy-related discrimination. The theory was also used by the Court in *Nashville Gas Co. v. Satty,* 434 U.S. 136 (1977), in which an employer's policy denying accumulated seniority to employees returning from education or pregnancy-related leaves was invalidated. The Court noted that while "on its face, petitioner's seniority policy appears to be neutral in its treatment of male and female employees . . . both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of [Title VII]." *Id.* at 140-141 (footnote omitted). *See, also, Abraham v. Graphic Arts International Union,* 660 F.2d 811 (D.C. Cir. 1981) (a disability leave policy had an adverse effect on women due to their special roles as childbearers); *deLaurier v. San Diego Unified School District,* 588 F.2d 674 (9th Cir. 1978) (an adverse impact analysis utilized to determine if the defendant's mandatory maternity leave policy violated Title VII); *Mitchell v. Board of Trustees,* 599 F. 2d 582 (4th Cir. 1979), *cert. denied,* 444 U.S. 965 (1979), (adverse impact theory used to evaluate a no-leave policy which effectively operated as a mandatory discharge rule for pregnant employees).

An inadequate leave policy, and especially a policy which does not guarantee a job when a disabled employee is ready and able to return to work, is tantamount to a policy which allows dismissal as a result of pregnancy. As the D.C. Circuit recognized in *Abraham:*

> [w]hile many female as well as male employees could have held a . . . job without any problem at all, any such jobholder confronted by childbirth was doomed to almost certain termination. Oncoming motherhood was virtually tantamount to dismissal. . . . In short,

---

[7] See Section III.B., *infra,* for a discussion of Congressional approval of health insurance plans which only cover pregnancy-related disabilities.

> the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—*an impact no male would ever encounter.*

660 F.2d at 819 (footnote omitted, emphasis added).

The continued viability of the adverse impact theory is supported not only by legislative history of the PDA, but also by regulations promulgated by the EEOC, the federal agency charged with the duty of interpreting and enforcing Title VII. The EEOC guidelines relating to pregnancy provide, in pertinent part:

> (c) Where the termination of an employee who is temporarily disabled [due to pregnancy] is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

29 C.F.R. § 1604.10(c) (1985).

This guideline pre-dated the 1978 Pregnancy Discrimination Act and was reissued unchanged following the enactment of this amendment. Both the House and Senate Committee Reports on the PDA expressly endorse the EEOC's interpretation of Title VII contained in 29 C.F.R. § 1604.10. S. Rep. No. 331, 95th Cong., 1st Sess. 2 (1977); H.R. Rep. No. 948, 95th Cong., 2d Sess. 2 (1978). As the Court stated in *Griggs v. Duke Power Co., supra,* 401 U.S. at 433-434, "the administrative interpretation of the Act by the enforcing agency is entitled to great deference." This principle should hold especially true when the Commission's interpretation has been explicitly endorsed by Congress.

C. The Pregnancy Discrimination Act Prohibits Policies Which Have An Adverse Impact On Pregnant Women And Does Not Require Identical Treatment Of Employees Disabled Due To Pregnancy And Those Disabled Due To Other Causes

The Pregnancy Discrimination Act contains two separate and distinct clauses:

> [1] The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy . . . ;
> [and]
>
> [2] women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k) (1982). The first clause makes pregnancy discrimination sex discrimination for the purposes of Title VII. Because this clause must be read in conjunction with all of Title VII, the usual Title VII theories of discrimination, including the adverse impact theory, are available to determine whether the statute has been violated.[8] Once the clause is placed in perspective, it follows that policies which discriminate against women disabled due to pregnancy are illegal regardless of how other disabilities are treated. The first clause of the PDA ensures that the general prohibition against discrimination

---

[8] For a fuller discussion of Congressional intent to maintain the adverse impact theory for claims of pregnancy discrimination, see Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978,* 94 Yale L.J. 929, 937-946 (1985).

based on sex includes a prohibition against policies which penalize women because of their pregnancy, just as Title VII prohibits penalizing an employee because of his or her race or religion. One commentator points out that this interpretation becomes apparent once the definition of the first clause of the PDA is inserted into the provisions of Title VII which it amends.[9]

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . [pregnancy]; or
>
> (2) to limit, segregate, or classify . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . [pregnancy].

42 U.S.C. § 2000e-2(a)(1) and (a)(2) (1964).

That the Pregnancy Discrimination Act is comprised of two separate and distinct clauses was recognized by the Court in *Newport News, supra,* 462 U.S. at 678. Cal Fed would ignore the first clause and have the second clause of the PDA control the meaning of the entire Act. However, the purpose of the clause is merely to clarify that pregnancy-related disabilities may not be excluded from otherwise all-inclusive health-related fringe benefit

---

9 Note, *Sexual Equality Under the Pregnancy Discrimination Act,* 83 Colum. L. Rev. 690, 695-696 (1983). This article provides an excellent review of the approaches taken by courts to pregnancy-related discrimination and the PDA.

plans offered by employers. This was the specific problem raised in the *Gilbert* decision.[10] *Newport News, supra,* 462 U.S. at 680 n. 20, and the motivating force behind the passage of the PDA.

Newport News clarified that the second clause of the PDA is not meant to limit the definition of discrimination to those contexts explicitly set forth in it. In fact, the notion that the language of the second clause comparing people on the basis of their ability or inability to work limits the coverage of the PDA to female employees was rejected. It was concluded that the first clause bans discrimination in general, and that this prohibition extends to coverage of employees' spouses where the exclusion of disabilities related to pregnancy of spouses would adversely affect male employees.

The conclusion that Congress intended to limit the application of the second clause of the PDA specifically to health-related disability fringe benefits is supported by the legislative history of the PDA.[11] The House Report, in discussing the provisions of the PDA, first addresses disability insurance, medical coverage and paid sick leave. H.R. No. 948, 95th Cong. 2d Sess. 5-6 (1978). The report goes on to cover the remaining issues such as leaves of absence, mandatory leaves, accumulated seniority and refusals to hire or promote. *Id.* at 6-7. The California law, guaranteeing a leave of absence to pregnant, disabled workers, comes under the latter section of the House Re-

---

10 *See* Section II.A., *supra.*

11 Note, *Sexual Equality Under the Pregnancy Discrimination Act,* 83 Colum. L. Rev. 690, 698-699 (1983).

port on the PDA and the first clause of the PDA. Because the state law forbids policies which would violate the first clause of the PDA, it is not preempted by Title VII, but is in harmony with the federal law.

D. Cal Fed's Failure To Provide Adequate Pregnancy-related Disability Leave Violates Title VII

Like the seniority-limitation policy invalidated in *Nashville Gas Co. v. Satty, supra,* under an adverse impact analysis, Cal Fed's inadequate leave policy subjects female employees to "a substantial burden that men need not suffer." 434 U.S. at 142. As the Court recognized in *Satty,* Title VII cannot be read to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different reproductive role. *Id.* at 142.

Cal Fed's disability leave policy violates Title VII in three major ways. First, an employee who has not completed three months of employment with Cal Fed may not take a leave of absence. J.A. 40. Therefore, a woman disabled due to pregnancy during her first three months of work for the company will be terminated. Second, if an employee is disabled by pregnancy, the position vacated may be permanently filled with no assurance that the same or a similar position will be provided when the woman can return to her job. J.A. 40. Third, an employee on a leave of absence due to pregnancy-related disability may be terminated if Cal Fed determines that a "similar and suitable position is not available." J.A. 40. These disability policies allow Cal Fed to discharge a woman because of her pregnancy or to require a longer leave than she desires.

While these policies appear sex-neutral on their face, they have an adverse impact on female employees who alone can become pregnant and suffer pregnancy-related disabilities.

In 1980, 65% of women in their prime childbearing years (ages 18-44) were in the paid workforce.[12] Eighty-five percent of these women are likely to become pregnant at least once during their working lives.[13] As Senator Hawkins, one of the co-sponsors of the 1978 Pregnancy Discrimination Act, noted, the PDA was designed in recognition of the fact that pregnancy and childbirth do result in some time period during which a woman is medically unable to work, and that for 95% of women, that period is six weeks or less. H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978). Thus, it is obvious that a no-leave policy will affect female employees more severely than male employees, for in addition to all the non-pregnancy related disabilities which males and females alike may suffer, approximately 85% of female employees are likely to require some time off from work because of pregnancy.[14]

---

12 S. Kamerman, A. Kahn and P. Kingston, *Maternity Policies and Working Women* 25 (1983) (hereinafter "Kamerman").

13 Kamerman at 25.

14 The essential importance of job protection for women temporarily disabled by pregnancy-related medical conditions is widely recognized and accommodated by the laws of foreign countries. Seventy-five countries, including every industrialized country except the United States, statutorily guarantee to women temporarily disabled due to pregnancy job-protected leave and a cash-benefit to replace all or part of lost wages. In the major industrialized countries the minimum leave provided is twelve weeks. In Europe, the average term is 5 months. Kamerman at 15.

At least one circuit court has held that an inadequate disability leave policy violates Title VII.

> An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have. Title VII outlaws employment discrimination traceable to an employee's gender, and it takes little imagination to see that an omission may in particular circumstances be as invidious as positive action.

Abraham v. Graphic Arts Int'l Union, supra, 660 F.2d at 819.

In order to prevail in an adverse impact case, it is not necessary to show that Cal Fed's policy had a statistically significant adverse impact on females specifically in Cal Fed's employ. Courts often recognize widely accepted statistical evidence in reaching their conclusion. *E.g., United Steelworkers of America v. Weber,* 443 U.S. 193, 198 n. 1 (1979); *Dothard v. Rawlinson, supra,* 433 U.S. at 330.[15]

Because Cal Fed's disability policy puts every woman who becomes pregnant at risk of losing her job, it has an adverse impact on women who engage in reproductive

---

[15] This approach has been utilized in a pregnancy discrimination challenge as well. In Mitchell v. Board of Trustees, *supra,* 599 F.2d 582, the court held that a school's no-leave policy had a disproportionate impact on women who alone could become pregnant. While the class of persons affected by the school district's no-leave policy was too small to permit the sort of reliable statistical proof frequently available in adverse impact cases, the court proceeded on the basis of several applications of the no-leave policy and on "judicial notice of the world as it is and as it is known in common experience to be." *Id.* at 585, citing Fed. R. Evid., Rule 201.

conduct, while men who engage in the same conduct are not so disadvantaged. Both the federal law through an adverse impact analysis and the state law at issue in this case forbid this employment practice. It therefore follows that the California law is not preempted by Title VII.

III. THE PREGNANCY DISCRIMINATION ACT LEAVES STATES FREE TO ENACT STATUTES REQUIRING EMPLOYERS TO GRANT ADEQUATE PREGNANCY-RELATED DISABILITY LEAVE

Even if this Court were to find that Cal Fed's disability leave policy is not a *prima facie* violation of Title VII, California Government Code § 12945(b)(2) is not preempted by federal law because the two statutes are not in conflict. There is nothing in Title VII or the PDA which forbids a state from enacting a law making it unlawful for employees to refuse a pregnant worker a reasonable unpaid disability leave, thereby preventing pregnancy-related terminations. Title VII and the PDA allow states to provide protection for workers which is in addition to that already mandated by Title VII. Preemption is only applicable if the state law purports to make a practice lawful which would be unlawful under Title VII.

Furthermore, the state and federal statutes are not in conflict because the goals of each are the same: to provide equal employment opportunities to pregnant women. Because the laws are consistent, the state law is not preempted by Title VII.

A. When Congress Enacted The Pregnancy Discrimination Act, It Endorsed Existing State Laws Requiring Employers To Grant Pregnant Employees Reasonable Leaves Of Absence

The argument that California Government Code § 12945(b)(2) is preempted by the Pregnancy Discrimination Act is not supported by its legislative history, which shows that Congress knew of and approved of state laws prohibiting pregnancy-based discrimination. The House Committee Report includes the finding that "[t]he following six States, as well as the District of Columbia, specifically include pregnancy in their Fair Employment Practices laws: Alaska, Connecticut, Maryland, Minnesota, Oregon and Montana." H.R. Rep. No. 948, 95th Cong., 2d Sess. 11 (1978).[16] Approval of such laws was reiterated throughout the legislative reports (*see, e.g.*, S. Rep. No. 331, 95th Cong., 1st Sess. 3 (1977)).

Both Montana and Connecticut have acts similar to California's.[17] The Montana Maternity Leave Act, Mont. Code Ann. § 49-2-310(1) and (2) (1985)[18], provides, *inter alia*, that:

---

16 The California Act was not enacted until September 28, 1978, ch. 1321, § 4, 1978 Cal. Stat. 4319. The fact that the statute had not taken effect earlier explains its omission from congressional debate.

17 The Montana statute, enacted in 1975, has been upheld by the state supreme court in the face of a preemption challenge virtually identical to Cal Fed's challenge in this case. Miller-Wohl Company, Inc. v. Commissioner of Labor and Industry, State of Montana, 692 P.2d 1243 (Montana S.Ct. 1984), *appeal docketed*, No. 84-1545 (U.S. March 27, 1985).

18 Formerly Mont. Code Ann. § 39-7-203, renumbered in 1983.

> It shall be unlawful for an employer or his agent to:
>
> (1) terminate a woman's employment because of her pregnancy;
>
> (2) refuse to grant to the employee a reasonable leave of absence for such pregnancy. . . .

Connecticut also has a Fair Employment Practices Law similar to California's which pre-dates the Pregnancy Discrimination Act. The Connecticut law, now contained in its Human Rights Code,[19] provides in part:

> (a) It shall be a discriminatory practice in violation of this section: . . . .
>
> (7) For an employer, by himself or his agent:
>
> (A) To terminate a woman's employment because of her pregnancy;
>
> (B) To refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy; . . . .

Conn. Gen. Stat. § 46a-60 (1985).

Both Connecticut and Montana, like California, guarantee a woman a reasonable unpaid leave for pregnancy-related disabilities. These statutes pre-date the Pregnancy Discrimination Act of 1978 and were approved by Congress in its deliberations on the proposed legislation. Surely, if Congress had meant to foreclose state laws such as those of California, Connecticut and Montana, it would have done so expressly rather than repeatedly approving state laws which forbid discrimination on the basis of pregnancy. Its failure to do so clarifies that Congress had no intent to preempt laws such as California's when it enacted the PDA.

---

19 This provision, formerly Conn. Gen. Stat. § 31-126, was transferred and set out as § 46a-60 in 1981.

B. Because Congress Approved Employer Policies Which Provide Benefits To Pregnant Workers, States Are Free To Adopt Statutes Requiring Such Employer Policies

The purpose of the PDA is not to *require* certain employment practices, but rather to *prohibit* certain discriminatory policies. Congress was aware that certain state laws went beyond the provisions of the PDA and expressly approved these laws. As Senator Javits testified, "although several state legislatures . . . have chosen to address the problem by mandating certain types of benefits for pregnant employees, [the PDA] does not go that far." 123 Cong. Rec. 29387 (1977). However, as was stated in debate on the floor of the House of Representatives: "[t]he States have authority under the Constitution to go beyond requirements of Federal law in these matters, so long as their laws do not conflict with the Federal law." 124 Cong. Rec. 21436 (1978) (remarks of Rep. Sarasin).

While Congress did not require employers to provide health-related benefits where no plan existed, the House Report allows for employers to provide pregnancy-related disability leave where no leave is provided for other disabilities.

> [The PDA] will not require an employer who does not provide disability benefits or paid sick leave to other employees to provide them for pregnant workers. In addition, the bill would permit employers who provide a voluntary *unpaid leave policy* to continue to do so. . . .

H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978) (emphasis added). By expressly discussing unpaid leaves separately from paid leaves, Congress must have meant to treat them differently. Therefore, an unpaid leave policy only for

pregnant workers does not require a comparison between employees based on their ability or inability to work. The PDA permits employers to maintain disability leave policies which provide unpaid leave for pregnancy-related disabilities with guaranteed job retention even if employees disabled by other causes are not guaranteed unpaid leave. If Title VII permits employers to adopt such policies for pregnant women only, state laws requiring policies for pregnant women only do not conflict with Title VII.

C. California Government Code § 12945(b)(2) Is Consistent With The Broad Goals Of Title VII

Title VII was enacted in 1964 in order to prohibit employment discrimination on the basis of race, sex, color, national origin, and religion. That purpose was further refined in 1978 by the passage of the Pregnancy Discrimination Act. Congress' intent in enacting this amendment was "to insure that working women are protected against all forms of employment discrimination based on sex." S. Rep. No. 331, 95th Cong., 1st Sess. 3 (1977).

Discriminatory employment practices based upon pregnancy have always been at the core of the problems faced by working women, and it is clear from legislative history that Congress intended to forbid these discriminatory practices. While congressional concern was focused particularly on the issue of temporary disability insurance benefits for pregnancy, Congress explicitly stated its broader goals:

> Although recent attention has been focused on the coverage of disability benefits programs, the consequences of other discriminatory employment policies on pregnant women and women in general has historically had

> a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.

H.R. Rep. No. 948, 95th Cong., 2d Sess. 6-7 (1978).

The California statute is aimed at accomplishing goals identical to those of the PDA. Pursuant to the California law, it is unlawful for an employer to refuse to grant an employee disabled on account of pregnancy a reasonable leave of absence not to exceed four months. California Government Code § 12945(b)(2). Similarly, the PDA makes it unlawful for an employer to discharge or otherwise discriminate against an employee because of sex. The PDA, clarifying the coverage of Title VII, specifies that "because of sex" shall be interpreted to mean "because of pregnancy." Both Title VII and the California statute ensure that women will not lose their jobs or job-related benefits solely because of pregnancy.

The California law does not conflict with Title VII or the PDA in any way. Rather, it is a stronger statement of the prohibition against discrimination on the basis of pregnancy than is found in the federal law. Because the goals of the two statutes are consistent, and because the legislative intent is not to prohibit policies which accommodate pregnancy-related disabilities and not other disabilities, the state law is not preempted by Title VII.

———o———

CONCLUSION

For the foregoing reasons, amici curiae respectfully request this Court to affirm the decision of the Ninth Circuit Court of Appeals holding that Title VII does not preempt California Government Code § 12945(b)(2). California's statute is permissible under Title VII because both the federal and state laws are intended to provide pregnant women equal employment opportunities. Furthermore, there is no conflict with Title VII because state law is designed to prevent employers from adopting inadequate pregnancy-related leave policies which, while neutral on their face, impact more harshly on pregnant workers. Laws like California Government Code § 12945(b)(2) should be upheld because they are designed to end the adverse impact of inadequate pregnancy leave policies, thereby assuring equality of opportunity to women who bear children while in the paid workforce.

Respectfully submitted,

Of Counsel:

Herma Hill Kay
Boalt Hall School of Law
University of California,
Berkeley
Berkeley, CA 94720

Judith E. Kurtz*
Nancy L. Davis
Marjorie Fujiki
Shauna I. Marshall
Equal Rights Advocates, Inc.
1370 Mission Street
San Francisco, CA 94103
(415) 621-0505

*Counsel of Record for Amici Curiae

APPENDIX

Equal Rights Advocates, Inc., the California Teachers Association, the Northwest Women's Law Center and the San Francisco Women Lawyers Alliance submit this brief amici curiae on behalf of respondents. Each of these organizations has actively advocated for an end to sex discrimination in employment. Through their involvement with pregnant women who have lost their jobs because of pregnancy-related disabilities, amici are convinced that laws like California Government Code § 12945(b) (2) are vital to assuring an end to discrimination against women.

Equal Rights Advocates, Inc. ("ERA") is a San Francisco-based public interest legal and educational corporation specializing in the area of sex discrimination. Since its inception over twelve years ago, ERA has litigated cases aimed at the promotion of equality of the sexes under law, and has worked to ensure the equal employment opportunity rights of pregnant women and the enforcement of state and federal legislation enacted to guarantee pregnant women freedom from discrimination. Through its contact with hundreds of women each year who call the organization for advice, ERA has found that unless women's unique procreative role is accommodated, they will continue to be disadvantaged in their employment.

The California Teachers Association ("CTA") is an employee organization representing approximately 189,000 certified public school employees in California. CTA's representation covers all aspects of the employment relations of certified employees with their public school employers, and includes litigation and legislative activity to secure equal employment opportunities for all employees

represented by CTA. Approximately 60% of the employees represented by CTA are women, and CTA has long advocated before employers, courts and legislators that equal employment opportunities for women include reasonable accommodation of women's childbearing role.

The Northwest Women's Law Center, based in Seattle, is a non-profit, public interest law organization concerned with furthering equal rights for women through law. The Law Center has special expertise in the area of sex-based employment discrimination and participates actively in litigation and educational programs regarding this issue. Aware that discrimination on the basis of pregnancy has serious economic consequences for women, the Law Center focuses upon methods of assuring equal employment opportunities for pregnant women.

The San Francisco Women Lawyers Alliance is a bar association composed primarily of women lawyers living and practicing in San Francisco. One of the principal purposes of the Alliance is to address issues of concern to women in the community. The organization has filed a number of amicus briefs and has lobbied for local legislation concerning child care and economic opportunities for women. The Alliance is committed to assuring that all women are provided equal employment opportunities, including women who are disabled due to pregnancy.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

Supreme Court, U.S.
FILED
JUN 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION; MERCHANTS AND MANUFACTURERS ASSOCIATION; and the CALIFORNIA CHAMBER OF COMMERCE,
Petitioners,

VS.

MARK GUERRA; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; CRUZ F. SANDOVAL; and the FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF FOR HUMAN RIGHTS ADVOCATES AND ERIKA SMITH AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

*CONSTANCE DE LA VEGA
LEGAL AID SOCIETY OF ALAMEDA COUNTY
2357 San Pablo Avenue
Oakland, California 94612
(415) 465-3833
Attorneys for Amicus Curiae Erika Smith

CLEARLY, GOTTLIEB, STEEN AND HAMILTON
RICHARD F. ZIEGLER
ANDREW WEISSMANN
One State Street Plaza
New York, N.Y. 10004
(212) 344-0600
Attorneys for Amicus Curiae Human Rights Advocates

*Counsel of Record

66 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE..... 1

STATEMENT OF THE CASE..... 2

SUMMARY OF THE ARGUMENT..... 6

ARGUMENT..... 8

I. Title VII as Amended By the PDA Should Be Interpreted to be Consistent With the Law of Nations... 8

II. Special Protections For Working Mothers Are Recognized as Fundamental and Non-discriminatory in International Human Rights Law..... 19

A. Major Human Rights Treaties Contain Special Protection for Working Mothers.... 21

B. Laws of Other Nations Accord Working Mothers Special Protections.... 35

C. The Ninth Circuit's Interpretation of Title VII as Amended by the PDA Is Consistent with the Law of Nations..... 49

CONCLUSION..... 54

TABLE OF AUTHORITIES

Cases — Page

Boehm v. Superior Court, 178 Cal. App.3d 494 (5th Dist. 1986)..... 11

California Federal Savings and Loan Association v. Guerra, 758 F.2d 390 (9th Cir. 1985), cert. granted, 106 S.Ct. 782 (1986)..... 5

Coker v. Georgia, 433 U.S. 584 (1977)..... 10

Cook v. United States, 288 U.S. 102 (1933) 9

Enmund v. Florida, 458 U.S. 782 (1982)..... 10

Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980)..... 12

General Electric v. Gilbert, 429 U.S. 125 (1976) 16

Head Money Cases, 112 U.S. 580 (1884)..... 10

Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980), modified on different grounds, 651 F.2d 96 (2d. Cir. 1981)..... 11

Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 1 (1804)..... 9

North Sea Continental Shelf Cases, 1969 I.C.J. 27..... 21

Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981)..... 11

Trop v. Dulles, 356 U.S. 86 (1958)..... 10

Weinberger v. Rossi, 456 U.S. 25 (1982)..... 9

DOMESTIC CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Civil Rights Act of 1964, Title VII, 42 U.S.C. 20003-2(a)..... 5

Fair Employment and Housing Act, Cal. Gov't Code §§ 12945(b)(2) (West 1980)..... 3

Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978)..... 4

Supremacy Clause, U.S. CONST. art. VI, cl. 2..... 10

Sup. Ct. R. 36.2..... 1

LEGISLATIVE HISTORY

Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Congress, 1st Sess. 5 (1977) 16, 18

House Comm. on Foreign Affairs, Human Rights Documents: Compilation of Documents Pertaining to Human Rights (Sep. 1983)..... 13

Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong. 1st Sess. (1977)..... 18

S. Exec. Doc. No. L, 92d Cong., 1st Sess. 1 (1971)..... 15

FOREIGN STATUTES AND REGULATIONS

Act of April. 17, 1979: Maternity Protection, §9 (Aus.), reprinted in ILO Legislative Series ("LS") 1979-Aus. 2.....

Economic Reform Act of Aug. 4, 1978, Title V, ch. I, §§ 116, 118, 127 (Belg.), reprinted in LS 1978-Bel. 2..... 44

Labor Act of Mar. 16, 1971, ch. IV, §§39-40 (Belg.), reprinted in LS 1971-Bel. 2..... 42

Act No. 161 of Apr. 12, 1978, §§104 (Den.), reprinted in LS 1978-Den. 3..... 40

Act No. 234 of June 4, 1980: Maternity Leave, §§1-5 (Den.), reprinted in LS 1980-Den. 1..... 39

Act of Nov. 12, 1975: Sex Discrimination, ch. 65, §§ 1, 2 (Gr. Brit.) reprinted in LS 1975-UK 1.....49

Act of Nov. 12, 1975: Employment Protection, §§35, 48 (Gr. Brit.) reprinted in LS 1975-UK 2.....47

INTERNATIONAL TREATIES, CONVENTIONS AND DECLARATIONS

African Charter on Human and Peoples' Rights art. 18(3), June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted 21 International Legal Materials 58 (1982).....33

American Convention of Human Rights No. 36, arts. 1,17(1), O.A.S. Off. OEA/SER K/XVI 11.1, Doc. 65, Rev. 1, Corr. 2 (1970), reprinted in Inter-American Commission on Human Rights, Organization of American States, Handbook of Existing Rules Pertaining to Human Rights 48-74, OEA/SER. L/V/II. 23, Doc. 21, Rev. 6 (1979).....31

American Declaration of Rights and Duties of Man art. 7, May 2, 1948, O.A.S. Off. Rec. OEA/SER. L/V/II, Doc. 21, Rev. 6 (1979)....32

Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 14, 213 U.N.T.S. 222, entered into force Sept. 3, 1953.....33

Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (1980)..... 25

Art. 3..... 25
Art. 4(2)..... 26
Art. 11(2)..... 26

European Social Charter Part II, Art. 8, 529 U.N.T.S. 89 entered into force Feb. 26, 1965..... 34

International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1967)
Art. 10(2)..... 23
Art. 6 24

International Labor Organization ("ILO") Convention No. 3, arts. 3, 6 (1919)..... 28, 29

ILO Convention No. 103, arts. 3, 6 (1952)..... 28, 29

ILO Discrimination (Employment and Occupation) Convention No. 111, arts. 2, 5(1)(1958)..... 30

Vienna Convention on the Law of Treaties art. 18(a) U.N. Doc. A/CONF 39/27 (1969), reprinted in 8 Int'l Legal Materials 679.... 14

Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810 (1948) arts. 2, 25(2)..... 27

OTHER AUTHORITIES

Akehurst, Custom as A Source of International Law, 47 Brit. Y.B. Int'l L. 1 (1974)..... 20

Burke, Coliver, de la Vega, & Rosenbaum, Application of International Human Rights Law in State and Federal Court, 18 Tex. Int'l L.J. 291 (1983)..... 13

Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analyses, 52 U. Cin. L. Rev. 3 (1983)..... 12

Economic Policy Council of UNA-USA, Work and Family in the United States: A Policy Initiative (1985)..... 36

Hartman, Unusual Punishment: The Domestic Effect of International Norms Restricting the Application of the Dealth Penalty, 52 U. Cin. L. Rev. 655 (1983)..... 20

L. Henkin, Introduction to The International Bill of Rights 1 (1981)..... 12

International Labor Organization, 2 Women at Work, Protection of Working Mothers: An ILO Global Survey (1964-1984) (1984)..... 29, 35, 49

Bureau of Public Information of the International Labor Organization, International Labor Standards: Their Nature - Their Working - Their Value (1981)..... 30

S. Kamerman, A. Kahn & P. Kingston, Maternity Policies and Working Women: An International Review (1983)..... 36

Leary, International Labor Convention and National Law (1982)... 28

W. McKean, Equality and Discrimination Under International Law (1983)..... 14

Paoli, Women Workers and Maternity: Some Examples from Western Europe, 121 Int'l Lab. Rev. 1 (1982)..... 37

INTEREST OF AMICI CURIAE

This brief is submitted in accordance with the Rules of this Court[1] by Human Rights Advocates and Erika Smith. Human Rights Advocates is a non-profit corporation that provides education about the use of international human rights law in domestic and international forums. The ultimate objective of Human Rights Advocates is to advance the cause of human rights so that basic protections are afforded to all persons. To further this purpose Human Rights Advocates has submitted briefs as amicus curiae in cases involving individual rights where international

---

[1] The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to rule 36.2 of the Rules of this Court.

standards provide assistance in interpreting federal and state statutes in question.

Human Rights Advocates would like to inform this Court of the relevant international standards that would provide assistance in interpreting the United States and California statutes in question in this case. The international standards applicable to this case deal specifically with measures aimed at protecting women during pregnancy.

Erika Smith is a woman who has recently given birth to a child. She is a resident of Oakland, California. She has been guaranteed that she can come back to her job when her maternity leave is over.

STATEMENT OF THE CASE

This case involves a challenge to the Fair Employment and Housing Act, Cal. Gov't Code §12945(b)(2) (West 1980) ("FEHA"), which makes it unlawful for an employer to refuse to grant an employee a reasonable pregnancy leave, not to exceed four months. The State of California and its agencies in charge of enforcing this statute, ("Respondents") have interpreted the FEHA to require any employer with an inadequate maternity leave policy to provide leaves of up to four months to pregnant employees, unless such leave is contrary to a bona fide occupational qualification or unless such leave is excused for reasons of business necessity.

Petitioners sought injunctive and

declaratory relief to prevent Respondents from enforcing this statute on behalf of Lillian Garland, an employee of one of the Petitioners, California Federal Savings and Loan Association ("Cal Fed"), who had not been reinstated at the conclusion of her pregnancy leave. Petitioners based their request for relief on the ground that the California law is inconsistent with and thereby preempted by Title VII. The federal district court granted the relief sought by Petitioners and held that the requirement that employers give employees disabled by pregnancy preferential disability rights was inconsistent with the purpose of the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076

(1978) ("PDA"), which amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a). Therefore, the district court concluded that the FEHA was preempted by Title VII.

Respondents appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the decision below and held that the FEHA is permissible under Title VII. While the PDA "makes it clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions", California Federal Savings and Loan Association v. Guerra, 758 F.2d 390, 395 (9th Cir. 1985), cert. granted, 106 S. Ct. 783 (1986), the PDA does not "demand that state law be blind to pregnancy's existence." Id. The Court ruled that the

PDA's requirement that women who are pregnant be treated equally must be measured in terms of equality of employment opportunities, not in amounts of money expended or in amounts of days of disability leave. Id. at 396.

SUMMARY OF THE ARGUMENT

Amici Curiae urge that the ruling of the Ninth Circuit in this case should be affirmed. Over 127 nations around the world and many international treaties provide protection for pregnant working women, analogous to the protection afforded by the California statute here at issue. These laws and treaties assure equal opportunity to participate in the work force by recognizing and compensating for the additional reproductive burden

on women who seek to be both workers and parents.

These laws and treaties are evidence of international law. Federal statutes, such as Title VII, are to be interpreted whenever possible to be consistent with international law. Such an interpretation is particularly appropriate in this case since the PDA's legislative history makes explicit reference to international norms. These norms are especially helpful in cases such as this where the federal statute at issue is ambiguous. The Ninth Circuit's interpretation of Title VII as not precluding the protection afforded pregnant women by the California Law -- protections adopted around the globe in recognition of women's unique child bearing role -- is

fully consistent with international norms regarding the equality of the sexes, and should therefore, be affirmed.

ARGUMENT

I. Title VII as Amended by the PDA Should Be Interpreted To Be Consistent with the Law of Nations

Customary international law as evidenced by treaties and the practice of other nations has often been used to interpret the laws of this nation. Indeed, the laws of this nation, when ambiguous, should be construed so that they are consistent with customary international law. Reference to the law of nations in a case such as this is particularly appropriate because there is a vast body of authority that reflects the international practice on the issue of special protections for

working mothers and there are several options that have been put forth in interpreting Title VII as amended by the PDA. Moreover, the legislative history of the PDA indicates that the laws of other nations were considered in the process that led to its adoption.

"[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains..." Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 34, 67 (1804). See also Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Cook v. United States, 288 U.S. 102 (1933). This principle of interpretation reflects the parity given federal and international law in United States courts under the

supremacy clause, U.S. CONST.. art. VI, cl. 2. Head Money Cases, 112 U.S. 580 (1884).

This Court, for example, has looked to the practice of other nations for determining what constitutes cruel and unusual punishment within the meaning of the Eighth Amendment. Trop v. Dulles, 356 U.S. 86, 102-103 (1958). This Court also looked to international standards in reaching its decision in Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (took note of the laws of other nations in deciding that the imposition of the death penalty for rape constitutes cruel and unusual punishment) and Enmund v. Florida, 458 U.S. 782 (1982). In the latter case, in determining that imposition of a death sentence upon a defendant who had

not intended to kill was cruel and unusual punishment this Court looked to the practice of countries in Europe and of countries currently or formerly in the British Commonwealth. Id. at 796 n.22.

Other courts in the United States have found international standards helpful in interpreting and defining federal and state laws. See, e.g., Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980), modified on different grounds, 651 F.2d 96 (2d Cir. 1981) (international standards on treatment of prisoners used to interpret and expand protections of the eighth amendment); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981); Boehm v. Superior Court, 178 Cal.App.3d 494 (5th Dist. 1986) (international standards

used to help define minimum subsistence level under general assistance statute). See, generally, Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analyses, 52 U. Cin. L. Rev. 3 (1983); Burke, Coliver, de la Vega & Rosenbaum, Application of International Human Rights Law in State and Federal Court, 18 Tex. Int'l L.J. 291, 308-311 (1983).

International human rights law has become an established, essential and universally accepted part of the life of the international community. L. Henkin, Introduction to The International Bill of Rights 1 (1981). Individuals are now understood to possess remedial rights based on international laws. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876

(2d Cir. 1980). Moreover, the United States has played an important role in fostering these developments over the years.[2]

Resort to international norms is particularly appropriate in construing statutes that concern pregnancy rights and sexual equality. Particularly when the United States participated in the development over the past forty years of a customary international norm that working women are to be accorded special protections if they are to have an equal opportunity to work. When the Universal Declaration of Human Rights

---

[2] In the past 15 years Congress has incorporated international human rights standards in dozens of laws. This Legislation is collected in House Comm. on Foreign Affairs, Human Rights Documents: Compilation of Documents Pertaining to Human Rights 24-58 (September 1983)

("Universal Declaration") was being drafted in 1948, Eleanor Roosevelt was the Chair of the Commission on Human Rights. In that capacity she pointed out that "equality did not mean identical treatment for men and women in all matters, for there were certain cases, as for example, the case of maternity benefits, where differential treatment was essential." W. McKean, Equality and Discrimination Under International Law 65 (1983). Furthermore, the United States participated in the drafting of many of the treaties discussed infra and has signed several of them.3/

---

3 Under the Vienna Convention a country may not take actions inconsistent with treaties it has signed but failed to ratify. See Vienna on the Law of Treaties art. 18(a), U.N. Doc. A/CONF 39/27 at 289 (1969) ("Vienna Convention"), reprinted

(Footnote 3 continued)

Equally important, the legislative history of the PDA evidences that Congress was aware of the practices of other nations and intended the PDA to bring the United States closer to the practices of those nations that afforded pregnant workers special protections. Senator Javits concluded his comments on the legislation by saying "[a]nd, finally and very importantly, ours is the only industrial country in the Western world which does not allow pregnancy

---

in 8 Int'l Legal Materials 679.The Vienna Convention entered into force January 27, 1980. On November 21, 1971, President Nixon transmitted the Vienna Convention to the Senate for its consent to ratification, but the Senate has not yet acted. However, the State Department has informed the President in its Letter of Submittal that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. No. L, 92d Cong., 1st Sess. 1 (1971).

disability as a form of disability. For all of those reasons I think the legislation is extremely well taken..." Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 5 (1977), (the "Hearings"). Senator Mathias, in his statement, supported the PDA and was critical of the Supreme Court's decision in General Electric v. Gilbert, 429 U.S. 125 (1976), because "it was a major setback to women's efforts for equity in the job market, not only in its specific application..., but also in its potential for erosion of Title VII protection against sex discrimination generally." Id. at 21. He concluded his statement with "I

am hopeful that a majority of the Congress will support this legislation and thus bring the United States in line with the policies of all other industrialized Western Countries." Id. at 23. Other persons testifying before the Senate and House Committees likewise referred to the laws of other nations as reasons why the PDA should be passed.4/

---

4 See, e.g., statements of Dr. Andre E. Hellegers, Wendy W. Williams, and Boris H. Block at the Hearings. Ms. Williams stated:

> A final irony in this web of disadvantages placed upon pregnant working women is that American women, almost alone among working women of the world, face the disabilities associated with no income protection. All the countries in Western and Eastern Europe have, by law, provided income protection to working women who have children, and all but five countries in the Western hemisphere have also so

(Footnote 4 continued)

provided.

> Passage of this bill would provide a tool for bringing the treatment of American women somewhat into line with the more enlightened world practices.

Id. at 115.

Boris H. Block concluded his statement with:

> We are not asking Congress to blaze new trails. Canada, France, Great Britain, West Germany and hosts of other nations, including Upper Volta, require income disability protection for pregnant working women. It is disgraceful that the United States as the wealthiest nation is not on the list.

Id. at 290. See also statements of Wendy Williams, Dr. Andre Hellegers and the American Nurses' Association in Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977). The American

(Footnote 4 continued)

II. Special Protections For Working Mothers Are Recognized As Fundamental and Non-discriminatory In International Human Rights Law

What are the customary international norms that this Court should look to in this case? Customary international law is essentially international common law, which arises

Nurses' Association in support of the amendment said:

> Other countries long ago established compensation programs for mothers, both during and after pregnancy, to provide each mother with the time necessary to support to (sic) maintain her health status, nurture her child, and assume her new role. Certainly, the statistics from these countries (i.e., Sweden, Denmark and Holland) suggest a possible association between this practice and the improved health status of their mothers and babies.

Id. at 277.

out of the practice of nations acting in a particular manner because they feel themselves legally bound to do so.

There are two requirements that must be met in order for a principle to attain the status of a rule of customary international law. First, there must be evidence of state practice[5] to show that the principle has been generally adopted by nations.[6] This state practice may be

---

[5] One scholar defines state practice as "any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations in abstracto (such as General Assembly resolutions), national laws, national judgments and omissions. Customary international law can also be created by the practice of international organizations..." Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int'l L. 1, 53 (1974).

[6] See, Hartman, Unusual Punishment: The Domestic Effects of International Norms Restricting the Appli-

(Footnote 6 continued)

deduced from treaties, whether ratified or not, national law, declarations and resolutions of intergovernmental bodies, and empirical evidence of the extent to which customary law is observed. See, North Sea Continental Shelf Cases, 1969 I.C.J. 27. See also, Filartiga v. Pena-Irala, 630 F.2d at 876.

Second, the state practice must be accompanied by opinio juris- the state's belief that the practice is required by an international rule of law.[7]

A. Major Human Rights Treaties Contain Special Protection for Working Mothers

---

cation of the Death Penalty, 52 U. Cin. L. Rev. 655, 666, 668 (1983).

[7] See Hartman, supra note 6 at 671; Akehurst, supra note 5.

Human rights treaties provide the most accessible and authoritative source of customary international law on the question of the right to special maternity protections. Indeed, the Vienna Convention recognizes in article 38 that a treaty may become "binding upon a third state as a customary rule of international law, recognized as such."[8]

There are many treaties that provide for special protections of working mothers and recognize that such protections do not constitute invalid discrimination between the sexes. The first of these is the

---

[8] Vienna Convention art. 38, U.N. Doc. A/CONF/39/27 at 289 (1969), reprinted in 8 Int'l Legal Materials 679. See also North Sea Continental Shelf Cases 1969 I.C.J. 3, 42.

International Covenant on Economic, Social and Cultural Rights ("International Covenant"), which was signed by the United States and which provides in article 10(2) that:

> Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits.

G.A. Res. 2200, 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1967).[9]

One of the other rights endorsed by the Covenant is "the right of work, which includes the right of everyone to

---

[9] The International Covenant entered into force in 1976 as a legally binding multilateral treaty when ratified by the required thirty-five countries. At present, more than sixty countries have become parties. The United States signed the International Covenant in 1977 but the Senate has not given its advice and consent to ratification.

the opportunity to gain his living by work which he freely chooses or accepts." The treaty states that parties agree to "take appropriate steps to safeguard this right." Covenant art. 6. Thus, the establishment in article 10(2) of the right to special protection during maternity is a recognition that such protections are necessary if women are to have an equal opportunity to work.

In later treaties the international community refined these concepts to provide specifically that special measures for protecting maternity shall not constitute discrimination while at the same time providing that women should be guaranteed the full enjoyment of all rights on a basis of equality with men.

Thus, the Convention on the Elimination of All Forms of Discrimination Against Women (the "Convention"), signed by the United States, provides that:

> States parties shall take in all fields, in particular in the political, social and economic and cultural fields, all appropriate measures, including legislation, to ensure full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Convention art. 3, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (1980).10/

Second, it provides that:

> Adoption by states parties of special measures, including

---

10 The Convention entered into force on September 3, 1981 when the requisite number of countries became parties. The United States signed the Convention in 1980 but has not ratified it.

> those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Convention art. 4(2), supra. The Convention specifically goes on to provide that:

> In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, states parties shall take appropriate measures:
>
> a. To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave...;
>
> b. To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

Convention art. 11(2), supra.

The concept that the right to special protection for maternity can go together with a prohibition of

discrimination on the basis of sex is not a new one. The Universal Declaration, which was unanimously adopted by resolutions in the United Nations General Assembly on December 10, 1948, established these joint rights in articles 2 and 25(2). Universal Declaration, G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948). The continual adherence to the principles in the Universal Declaration by nations who have subsequently joined the United Nations and by their incorporation into many countries' constitutions has made these standards "an authoritative statement of the international community." Lareau v. Manson, 507 F. Supp. at 1193 n.18.

Other treaties on this subject that can be used as an indication of

customary international law are the conventions of the International Labor Organization ("ILO"). The ILO conventions when ratified by member countries, have the force of a treaty. See V. Leary, International Labor Conventions and National Law at 12 (1982). One of the ILO conventions recognizes the right to job-protected maternity leave, Convention No. 3, arts. 3, 6 '1919). Subsequently, Convention No. 3 was revised by Convention No. 103 (1952), which not only provides for a job-protected maternity leave but also for a minimum of twelve weeks' leave, cash and medical benefits, job security and nursing breaks.11/

---

11 The relevant text of Articles 3 and 6 of ILO Convention 103 (1952) are as follows:

(Footnote 11 continued)

Article 3:

1. A woman to whom this Convention applies shall, on the production of a medical certificate stating the presumed date of her confinement, be entitled to a period of maternity leave.

....

6. In case of illness medically certified arising out of confinement, the women shall be entitled to an extension of the leave after confinement, the maximum duration of which may be fixed by the competent authority.

Article 6:

While a woman is absent from work on maternity leave in accordance with the provisions of article 3 of this convention, it shall not be lawful for her employer to give her notice of dismissal at such a time that the notice would expire during such absence.

At present, 28 nations have ratified Convention No. 3, and 22 Convention, Convention NO. 103. The United States has not ratified either. International Labor Organization, 2 Women at Work, Protection of Working Mothers: An ILO

(Footnote 11 continued)

In addition, the ILO Discrimination (Employment and Occupation) Convention No. 111, art. 2 (1958) requires equal treatment and the elimination of discrimination in the work place. At the same time, article 5(1) states "special measures of protection or assistance provided for in other Conventions or Recommendations ... shall not be deemed to be discrimination."12/

Regional treaties also provide that equality of treatment and special treatment during maternity are not

---

Global Survey (1964-84) 65-66 (1984).

12 As of 1981, 101 out of 145 members of the ILO had ratified this Convention. The United States has not ratified it. Bureau of Public Information of the International Labor Organization, International Labor Standards:Their Nature - Their Working-Their Value 46 (1981).

mutually exclusive. The American Convention on Human Rights (the "American Convention"), enacted under the Charter of the Organization of American States ("OAS") is one such treaty. Article 1 of the American Convention prohibits arbitrary discrimination and article 17(1) requires protection of the family by society and the State. American Convention NO. 36 at 1, OAS off. OEA/SER K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970), entered into force July 18, 1978, reprinted in Inter-American Commission on Human Rights, Organization of American States, Handbook of Existing Rules Pertaining to Human Rights 48-74, OEA/SER. L/V/II. 23, Doc. 21, Rev. 6 (1979). The OAS' American Declaration of Rights and Duties of Man

("American Declaration") further provides that:

> All women, during pregnancy and the nursing period, ... have the right to special protection and aid.

American Declaration art. 7, May 2, 1948, OAS Off. Rec. OEA/SER. L./V./II. 23, Doc. 21, Rev. 6 (1979).[13/]

The African Charter on Human and Peoples' Rights also implicitly sanctions job-protected maternity leave by providing that:

> The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.

African Charter on Human and Peoples' Rights art. 18(3), O.A.U. Doc. CAB/LEG/67/ 3 Rev. 5, adopted June 27, 1981, reprinted in 21 Int'l Legal Materials 58 (1982).

Another regional document, the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), includes prohibitions against discrimination on the basis of sex. European Convention art. 14., 213 U.N.T.S. 222, entered into force September 3, 1953. The socio-economic rights in the European Convention were elaborated upon in the European Social Charter which specifically provides for twelve weeks maternity leave, paid or with

---

13 While the adoption of the American Convention was delayed, the OAS set up the Inter-American Commission on Human Rights and empowered the Commission to use the Declaration to implement human rights goals. Now both the American Convention and the American Declaration are legally binding, depending on which states have ratified the American Convention.

adequate social security. European Social Charter, Art. 8, 529 U.N.T.S. 89, entered into force Feb. 26, 1965.14/

These are but some of the treaties establishing the principles that in

---

14 Article 8 provides, in pertinent part:

> With a view to ensuring the effective exercise of the right of employed women to protection, the Contrating Parties undertake:
>
> 1. To provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after child-birth up to a total of at least twelve weeks;
>
> 2. To consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence.

order for women to have equality in opportunity to work they must also have a right to special protections during pregnancy. One such special protection is the right to return to their jobs after a reasonable maternity leave. The pronouncements in these treaties are clear indications that there is a customary international norm on this subject.

B. Laws of Other Nations Accord Working Mothers Special Protections

Further evidence of state practice appears in the national laws of 127 countries which provide maternity protection for working women, including maternity leave. See ILO Women at Work, Protection of Working Mothers: An ILO Global Survey (1964-1984) supra, at 9-52 (1984); S. Kamerman, A. Kahn & P.

Kingston, Maternity Policies and Working Women: An International Review, 14, 15 (1983); Economic Policy Council of UNA-USA, Work and Family in the United States: A Policy Initiative 10, 64 (1985).

Virtually all industrialized nations except the United States guarantee maternity leave. Countries that range widely in political, cultural and religious character all provide protection for pregnant workers. These countries include, in Europe alone, Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hungary, Ireland, Italy, Luxem-bourg, Netherlands, Norway, Poland, Spain, Sweden, Switzerland and the United

Kingdom. See ILO, Women at Work, supra, at 8, 33-41; Economic Policy Council, supra, at 10, 46; S. Kamerman, supra, at 15-27; see also Paoli, Women Workers and Maternity: Some Examples from Western Europe, 121 Int'l Lab. Rev. 1 (1982). These countries provide for special protection for pregnant women at work and also recognize that men and women are to be treated equally and are to have an equal opportunity to participate in the work force. See, e.g., Paoli at 3 & n.11 ("Finally, the principle whereby the protection of pregnant women does not constitute discrimination is widely recognized by the national legislations").

For example, in Denmark women have the right to take four weeks of pregnancy leave prior to the expected

date of birth, and fourteen weeks after. An employer cannot dismiss a women because she takes pregnancy leave or because she is pregnant.15/

---

15 The Danish statutes reads, in pertinent part:

1. (1) A woman worker shall be entitled to be absent from her work on account of her pregnancy and confinement from the date estimated to be four weeks before the date of the child's birth and 14 weeks after this latter date (maternity leave).

....

2. The period for which a worker has been absent in accordance with section 1 shall be reckoned towards her seniority in employment. The foregoing shall not apply for pension purposes.

3. No employer may dismiss a worker because she has applied to avail herself of the right to be absent or because she has been absent in accordance with section 1, nor may he dismiss her on account of her pregnancy or confinement or the adoption of a child.

4. A woman worker who is on maternity leave shall inform her employer in reasonable time (but with

(Footnote 15 continued)

Danish law, while it provides special protection to pregnant workers in the form of leaves and job-assurance, also provides that the sexes shall be treated equally.16/ But

---

at least 14 days' notice and not later than the end of her maternity leave) that she wishes to resume her work.

5. No departure from the provisions of this Act may be made by contract to a worker's detriment.

Act No. 234 of June 4, 1980: Maternity leave, §§1-5 (Den.), reprinted in ILO Legislative Series ("LS") 1980-Den. 1.

16 The Danish law, "respecting equality of treatment as between men and women with regard to employment" provides in pertinent part:

1. (1) For the purposes of this Act equality of treatment as between men and women means that no discrimination occurs on grounds of sex. The foregoing applies to both direct and indirect discrimination, especially in connection with pregnancy or marital or family status.

(2) This Act shall be without prejudice to any provisions

(Footnote 16 continued)

identical treatment of the sexes is not called for by Danish law. Rather, recognition of and compensation for women's unique reproductive role is

---

made for protection of women, especially in connection with their pregnancy and confinement.

....

2. Every employer shall treat men and women alike for the purposes of employment in a job. The foregoing shall also apply to transfers and promotions.

3. (1) Every employer employing men and women at the same workplace shall treat them alike for the purposes of their access to vocational guidance, training, further training and retraining.

....

4. Every employer employing men and women at the same workplace shall treat them alike for the purposes of their conditions of employment. The foregoing shall also apply to dismissals.

Act No. 161 of Apr. 12, 1978, §§ 1-4 (Den.), reprinted in LS 1978-Den 3 (Emphasis added).

seen as the only way to assure true sexual equality.

To take another example, Belgian law guarantees women the right to take six weeks of leave preceding the expected delivery date. The woman's employer also is prohibited from terminating the women for any reason related to her pregnancy.17/

---

17 The Belgian law provides, in pertinent part:

39. The employer shall be bound to grant a woman worker, at her request, maternity leave at the earliest as from the sixth week preceding the presumed date of her confinement. For this purpose the woman worker shall submit to him a medical certificate to the effect that the confinement should normally take place at the end of the period of maternity leave requested. If the confinement takes place later than the date indicated by the medical practitioner, the maternity leave shall be extended until the actual date of confinement.

....

(Footnote 17 continued)

The Belgian law also provides that men and women should be treated

---

40. The employer of any pregnant woman worker shall not do any act capable of unilaterally terminating the employer-employee relationship as from the date on which he is informed by medical certificate of the state of pregnancy until the end of the month following the postnatal maternity leave, except for reasons unconnected with the physical state resulting from the pregnancy or confinement.

The onus of proof of the above reasons shall rest with the employer.

If the grounds for dismissal do not meet the conditions laid down in the first paragraph of this section or if no grounds are alleged, the employer shall be bound to pay the woman worker lump-sum renumeration, without prejudice to any damages which may be payable to such worker in the case of breach of contract of employment.

Labor Act of Mar. 16, 1971, ch. IV, §§39-40 (Belg.), reprinted in LS 1971-Bel. 2.

equally.[18] Under Belgian law,

---

18 The Belgian law regarding equality of treatment as between men and women relating to conditions of employment provides, in pertinent part:

116. As provided in section 6 of the Constitution, the principle of equality of treatment as between men and women shall apply to access to employment, promotion, vocational guidance, training, further training, retraining and self-employment opportunities and to conditions of employment.

....

118. The principle of equality of treatment provided for in Title V of this Act shall imply the absence of discrimination based on sex, either directly or indirectly by reference, inter alia, to marital or family status.

Notwithstanding the foregoing, the special provisions made for the protection of maternity shall not be deemed to be discriminatory.

....

127. Every worker shall be assured of equality of treatment in all provisions and practices relating to conditions of employment and dismissal.

(Footnote 18 continued)

identical treatment of the sexes is not viewed as providing sexual equality. Only by compensating for the biological differences between the sexes are men and women placed on an equal footing.

As a final example, the law in Great Britain gives women the right to an eleven week leave prior to the expected delivery date and twenty-nine

---

It shall more particularly be unlawful to --

1. refer to the worker's sex in any conditions of employment or conditions, criteria or grounds for dismissal or to use elements in such conditions, criteria or grounds which, even in the absence of an explicit reference to the worker's sex, result in any form of discrimination.

2. establish or apply conditions, criteria or grounds in a discriminatory manner depending on the worker's sex.

Economic Reform Act of Aug. 4, 1978, Title V, ch. I, §§ 116, 118, 127 (Belg.), reprinted in LS 1978-Bel. 2 (emphasis added).

weeks after. The employee is entitled to return to her original employer and to the job in which she was employed on terms and conditions of employment no less favorable than if she had not been absent.19/ Again, English law provides

---

19 The English law provides, in pertinent part:

35. Rights of employee in connection with pregnancy and confinement. (1) An employee who is absent from work wholly or partly because of pregnancy or confinement shall, subject to the following provisions of this Act, be entitled -

(a) in accordance with sections 36 to 38 below, to be paid by her employer a sum to be known as maternity pay; and

(b) in accordance with sections 48 to 50 below and Schedule 3 of this Act, to return to work.

(2) An employee shall be entitled to the rights referred to in subsection (1) above whether or not a contract of employment subsists during the period of her absence but, subject to subsection (3) below, she shall not be so entitled unless -

(Footnote 19 continued)

(a) she continues to be employed by her employer (whether or not she is at work) until immediately before the beginning of the eleventh week before the expected week of confinement;

(b) she has at the beginning of that eleventh week been continuously employed for a period of not less than two years; and

(c) she informs her employer (in writing if he so requests) at least three weeks before her absence begins or, if that is not reasonably practicable, as soon as reasonably practicable -

(i) that she will (or is) absent from work wholly or partly because of pregnancy or confinement, and

(ii) in the case of the right to return, that she intends to return to work with her employer.

48. Right to return to work. (1) The right to return to work of an employee who has been absent from work wholly or partly because of pregnancy or confinement is, subject to the following provisions of this Act, a right to return to work with her original employer, or, where appropriate, his successor, at the time

(Footnote 19 continued)

that men and women shall not be discriminated against on the basis of sex.20/ Parity between men and women

before the end of the period of 29 weeks beginning with the week in which the date of confinement falls, in the job in which she was employed under the original contract of employment and on terms and conditions not less favorable than those which would have been applicable to her if she had not been so absent.

Act of Nov. 12, 1975: Employment protection, §§ 35, 48 (Gr. Brit.), reprinted in LS 1975-UK 2.

20 The English law regarding the promotion of "equality of treatment between men and women" provides, in pertinent part:

1. Sex discrimination against women. (1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if -

(a) on the ground of her sex he treats her less favorably than he treats or would treat a man, or

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but -

(Footnote 20 continued)

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

(2) If a person treats or would treat a man differently according to the man's marital status, his treatment of a woman is for the purposes of subsection (1)(a) to be compared to his treatment of a man having the like marital status.

2. Sex discrimination against men. (1) Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.

(2) In the application of subsection (1) no account shall be take of special treatment afforded to women in connection with pregnancy or childbirth.

(Footnote 20 continued)

in the workplace is only achieved when woman's unique reproductive role is accounted for.[21]

C. The Ninth Circuit's Interpretation of Title VII as Amended by the PDA Is Consistent with The Law of Nations

The Ninth Circuit's ruling that the FEHA is not inconsistent with Title VII fully conforms to international

Act of Nov. 12, 1975: Sex Discrimination, ch. 65, §§ 1-2 (Gr. Brit.), reprinted in LS 1975-UK (emphasis added).

[21] In addition to granting leaves of absence and job-assurance to pregnant workers, 83 countries provide women work breaks so as to be able to nurse their child. ILO Woman at Work, supra , at 9-52.

The wide-spread adoption by over eighty nations of laws assuring nursing time is one more indication of the international norm that special treatment must be afforded women to compensate for their unique biological role in reproduction.

standards that establish that women are entitled to special protections during maternity in order to have equal opportunity to employment and that such protections do not constitute invalid discrimination between the sexes.

In ruling that the FEHA is permissible under Title VII, the Court found that the PDA did not require that state law be blind to pregnancy's existence, just as numerous international treaties and nations have harmonized the prohibition of sex-based discrimination with the requirement that working women be given special protection during maternity.

Petitioners challenge the Court's ruling on the ground that this preferential treatment reinforces common stereotypes having no

relationship to individual worth. Petitioner's Brief at 14. This argument ignores the fact that the purpose and effect of the law's different treatment of the sexes is to provide equality of opportunity to participate in the workforce, rather than to discriminate against either pregnant or non-pregnant persons. Only women bear the biological burden of reproduction and only women denied maternity protection must choose between being a parent and being a worker. The international community and numerous countries have clearly seen the need for special maternity treatment in order to assure equal opportunity to participate in the workforce.

Petitioners would have Title VII

construed so as to prohibit the protections afforded pregnant employees by the California law -- protections that are afforded by numerous nations and international treaties in recognition of women's unique reproductive role. They argue that the legislative history of the PDA indicates that special programs are not required. However, these arguments do not lead to the next conclusion that special programs that further the purpose of the PDA are prohibited. Indeed, states should be allowed to take the steps they deem necessary to further the purpose of the statute-- to end discrimination against pregnant employees and to assure equal opportunity to participate in the workplace. The Ninth Circuit correctly

resolved the conflict between several clauses of the PDA in favor of a conclusion that the PDA constructs a "floor beneath which pregnancy disability benefits may not drop -- not a ceiling above which they may not rise," Cal Fed, 758 F.2d at 396.

Thus, this Ccurt should not read into Congress' failure to mandate all the rights that would be necessary to achieve the goal of equality of opportunity in employment an intent to foreclose the states from providing that opportunity. FEHA is but one step taken to ensure that women are able to participate equally with men in the workforce. Without this minimum protection -- that of being guaranteed maternity leave and the right to return to their job -- women would have to

make a choice between working or having a child: a choice that men do not have to make to participate in the workforce. Dozens of countries have already recognized and compensated for this additional biological burden that women face. This is but one step in many that could be taken to reach the standards of sexual equality set forth in customary international law.

CONCLUSION

For the above reasons, the ruling of the United States Court of Appeals for the Ninth Circuit should be affirmed.

/ / /

Respectfully submitted,

CONSTANCE DE LA VEGA*
Legal Aid Society of Alameda County
2357 San Pablo Avenue
Oakland, California 94612
(415) 465-3833
Attorneys for Amicus Curiae Erika Smith

RICHARD F. ZIEGLER
ANDREW WEISSMANN
Clearly, Gottlieb, Steen & Hamilton
One State Street Plaza
New York, New York 10004
(212) 344-0600
Attorneys for Amicus Curiae Human Rights Advocates

*Counsel of Record

June, 1986

Counsel gratefully acknowledge the assistance of Paul Hoffman, Claire Osborn, Jason Abrams, Connie R. Kimball and Mary Rasenburger, in preparation of this brief.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

In the Supreme Court
OF THE
United States

October Term, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, MERCHANTS AND MANUFACTURERS ASSOCIATION, and CALIFORNIA CHAMBER OF COMMERCE
Petitioners,

v.

MARK GUERRA, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, CRUZ F. SANDOVAL, and FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF LILLIAN GARLAND, REAL PARTY IN INTEREST, IN SUPPORT OF RESPONDENT.

JOAN M. GRAFF
ROBERT BARNES
(Counsel of Record)
PATRICIA A. SHIU
THE EMPLOYMENT LAW CENTER
OF THE LEGAL AID SOCIETY
OF SAN FRANCISCO
1663 MISSION STREET, SUITE 400
SAN FRANCISCO, CA 94103
(415) 864-8848

32pp

TABLE OF CONTENTS

	Page(s)
Interest of Amicus Curiae	1
Statement of the Case	5
Statement of the Facts	5
Nature of the Proceedings Below	5
Summary of the Argument	8
Argument	11
I	
The District Court Erred in Granting Summary Judgment in Favor of Petitioners	11
A. The Ninth Circuit Correctly Granted Summary Judgment For Respondent Since California Law Mandates Reasonable Accommodation For All Employees, Regardless Of Sex	13
1. The FEHA's pregnancy leave subsection and the FEHA's disability discrimination sections provide *all* covered disabled employees reasonable accommodation; therefore, subsection 12945(b)(2) does not conflict with Title VII, as amended by the PDA	13
2. California's FEHA proscribes discrimination on the basis of physical handicap	15
3. California's employment disability laws require that employers covered thereunder reasonably accommodate the physical handicap of an employee	16
B. Employees Who Are Physically Handicapped Receive The Same Treatment Under California's FEHA As Employees Disabled By Pregnancy Under Subsection 12945(b)(2)	17
II	
Dismissal of Writ Is Proper Because Writ of Certiorari Was Improvidently Granted	19

TABLE OF CONTENTS

	Page(s)
A. If This Court Concludes That It Is Uncertain Whether California Law Mandates Reasonable Accommodation For Employees With Non-Pregnancy Related Disabilities, Then The Writ Of Certiorari Should Be Dismissed As Improvidently Granted	20
B. Dismissal Of The Writ Of Certiorari As Improvidently Granted Based On An Incomplete And Ambiguous Factual Record Is Proper And Comports With The Court's Policy Of Avoiding Constitutional Issues If Possible	21
III	
Title VII Does Not Preempt California Government Code Subsection 12945(b)(2) Because the California Statute Does Not Conflict With the Remedial Purposes of Title VII's Pregnancy Discrimination Act	23
IV	
The District Court Did Not Have Subject Matter Jurisdiction *Over This Action*	24
V	
If the Court Finds That the Lower Court Properly Exercised Subject Matter Jurisdiction Over Cal. Fed.'s Complaint, That the State Law Disability Coverage Question Was Not Necessary to a Disposition of the Cross-Motions for Summary Judgment, and That the State Pregnancy Disability Law Is Preempted by Title VII, as Amended by the PDA, Then *Amicus* Garland Alternatively Argues That Title VII Requires Extension of Benefits	25
Conclusion	26

TABLE OF AUTHORITIES

Cases

	Page(s)
Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	12
American National Insurance Co. v. Fair Employment, 32 Cal.3d 603 (1982)	15
Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142 (1985)	3
Belcher v. Stengel, 429 U.S. 118 (1976)	19, 20
California Federal Savings & Loan Ass'n. v. Guerra, 758 F.2d 390 (9th Cir. 1985), *cert. granted*, 106 S.Ct. 783 (1986) (No. 85-494)	7
DFEH v. Bay Area Rapid Transit District, FEHC Dec. No. 80-21 [CEB Precedential Decisions 1980 No. 11]	16
Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295 (9th Cir. 1981)	12
Ex Parte Young, 209 U.S. 123 (1908)	24
Fisher v. Superior Court, 177 Cal.App.3d 779 (1986)	12, 16, 17, 21
Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)	24
Fry v. United States, 421 U.S. 542 (1975)	
Gee v. Tenneco, Inc., 615 F.2d 857 (9th Cir. 1980)	12
Gorman v. Washington University, 316 U.S. 98 (1942)	21
Gotthilf v. Sills, 375 U.S. 79 (1963)	21
Hagans v. Lavine, 415 U.S. 528 (1974)	25
Hammerstein v. Superior Court of California, 341 U.S. 491 (1951)	21
Hutchinson v. United States, 677 F.2d 1322 (9th Cir. 1982)	12
Holland v. Boeing, Co., 583 P.2d 621 (1978)	16
Louisville Trust Co. v. Knott, 101 U.S. 225 (1903)	25
McCray v. New York, 461 U.S. 961 (1983)	20
Miller-Wohl Co. v. Com'r of Labor and Industry, Etc., 685 F.2d 1088 (9th Cir. 1982)	3, 24
Nyhus v. Travel Management Corp., 466 F.2d 440 (D.C. Cir. 1972)	12
Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 105 S.Ct. 658 (1985)	14

TABLE OF AUTHORITIES CITED

CASES

	Page(s)
Public Service Commission v. Wyckoff, 344 U.S. 237 (1952)	25
Rescue Army v. Municipal Court, 331 U.S. 549 (1947)	20, 21, 22
Semaan v. Mumford, 335 F.2d 704 (D.C. Cir. 1964)	12
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	24, 25
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)	25
United States v. Moore, 7 U.S. (3 Cranch) 159 (1805)	25
Wolf v. Weinstein, 372 U.S. 633 (1963)	21

Statutes

Title VII of the Civil Rights Act of 1964, §§ 2000e, et seq.	passim
Pregnancy Discrimination Act of 1978, 92 Stat. 2076	passim
28 U.S.C. Section 1257	21
Fair Employment and Housing Act — California Government Code Sections 12900-12996 (West 1982, Supp. 1986)	6, 8
California Government Code Section 12900 et seq.	2, 6
California Government Code Section 12926(h)	15
California Government Code Section 12940	5, 8, 11, 19
California Government Code Section 12945(b)(2)	passim
Title 2, California Administrative Code Section 7293.9	16
Title 2, California Administrative Code Section 7293.9(a)(2)	17

Federal Rules

Federal Rule of Civil Procedure, Rule 24(a)(2)	7
Federal Rule of Civil Procedure, Rule 56(c)	11, 12

Texts

C. Wright & A. Miller, *Federal Practice and Procedure*, Section 2767, Supp. p. 54	24
C. Wright & A. Miller, Cooper, E. Gressman, 10 *Federal Practice and Procedure*, Section 4004	19
Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy For Employment Discrimination*, 34 Hastings L.J. 1055 (1983)	15

TABLE OF AUTHORITIES CITED

TEXTS

	Page(s)
Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's Law Journal 1 (1985)	8
Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate L. Rev. 513 (1983)	8
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, 6th Edition (1986)	20

No. 85-494

In the Supreme Court
OF THE
United States

October Term, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, MERCHANTS AND MANUFACTURERS ASSOCIATION, and CALIFORNIA CHAMBER OF COMMERCE
Petitioners,

v.

MARK GUERRA, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, CRUZ F. SANDOVAL, and FAIR EMPLOYMENT AND HOUSING COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF LILLIAN GARLAND, REAL PARTY IN INTEREST, IN SUPPORT OF RESPONDENT.

INTEREST OF AMICUS CURIAE

Amicus, Lillian Garland,[1] the real party in interest in this action and in the administrative and court proceedings below, respectfully submits her *amicus curiae* brief in support of respondents. Ms. Garland's stake in the outcome of this case is great.

---

[1]Letters from counsel for the parties to this action, which consent to the filing of this Brief for the *Amicus Curiae,* were filed with the Clerk of the Court pursuant to United States Supreme Court Rule 36.2 on June 12, 1986.

Lillian Garland lost her job with petitioner California Federal Savings and Loan ("Cal. Fed.") upon returning to work following a three month pregnancy disability leave. As a result of losing her job, Ms. Garland could not afford housing and was evicted from her apartment. Without any financial means to support herself and her child, Ms. Garland also lost custody of her child.

It is beyond dispute that Ms. Garland's life dramatically changed after she lost her job. In this regard, the plight of Ms. Garland is not unique; she is one of the several thousand working mothers in the United States' labor force who faces the risk of losing her job after childbirth because of personnel policies which provide insufficient pregnancy disability leave or no leave at all. Unlike male employees, only female employees are disabled by pregnancy[2] and thus, only women are affected by an employer's inadequate pregnancy disability leave policy.

Ms. Garland's interest in this case is direct and substantial since this Court's decision will determine her right to relief under the California Fair Employment and Housing Act ("FEHA"), (California Government Code Section 12900 et seq.). Her right to proceed with her administrative complaint now pending before the California Fair Employment and Housing Commission ("Commission"), and eventually her right to recover damages resulting from the denial of her right to reinstatement lay in the balance. It is because Ms. Garland filed an administrative complaint with the state agency which enforces the FEHA that this case is before the Court today.

This brief *amicus curiae* is submitted by the Employment Law Center of the Legal Aid Society of San Francisco on behalf of Lillian Garland. The Legal Aid Society and its principal project, the Employment Law Center, share a tradition of providing legal representation to the poor.

The Legal Aid Society of San Francisco ("Society") was founded in 1916 to provide legal representation for those unable to afford private counsel. The Employment Law Center, ("ELC"), the principal project of the Society, has pioneered the employment law field for over a decade. It focuses on legal

---

[2]The term "pregnancy" as used herein includes "pregnancy, childbirth, or related medical conditions."

problems which effect disadvantaged people as they seek to secure and retain employment and it represents those who find employment opportunities denied them for reasons other than their ability to do the job.

ELC has expertise in areas pertaining to discrimination on the basis of handicap, sex discrimination, as well as those issues affecting working parents.

In the area of discrimination on the basis of handicap, ELC had filed several amicus briefs, the most recent of which was filed in *Atascadero State Hosp. v. Scanlon*, 105 S.Ct. 3142 (1986). Disability projects coordinated through ELC include the Cancer and Employment Law Education Project, (a state and national project funded by the American Cancer Society), the Medical Standards Project (a joint project of ELC and the Disability Rights Education and Defense Fund), the AIDS and Employment Project, and the Disability Employment Rights Project which provides practical information to individuals interested in pursuing statutorily required administrative remedies without the assistance of counsel. Last year ELC also submitted testimony to Congress on H.R. 1294, a bill introduced by Representative Mario Biaggi entitled "The Cancer Patients Employment Rights Act of 1985."

In the area of sex discrimination, ELC has been extensively involved with issues affecting women's rights to equal employment opportunities. ELC recently testified before the Subcommittee on Employment Opportunities, a Congressional Subcommittee of the Committee on Labor and Education regarding Executive Order 11246 and affirmative action. Among the several *amicus* briefs filed by ELC, the most recent include those filed in *Wygant v. Jackson Board of Education*, 54 U.S.L.W. 4479 (5/20/86), *Meritor Savings Bank, FSB v. Vinson*, No. 84-1979 and *Miller-Wohl Co. v. Committee of Labor and Industry*, 685 F.2d 1088 (9th Cir. 1982).

ELC also litigates cases alleging sexual harassment. One of its current cases involves a sexual harassment victim's constitutional right to be free of an unwarranted psychiatric examination (*Vinson v. Peralta Community College District* (SF 24932). It is currently pending before the California Supreme Court. One of its recently litigated cases is *Priest v. Rotary*, 98 F.R.D. 755

(N.D. 1983) in which the court held that in a sexual harassment case, evidence regarding plaintiff's sexual history is inadmissible to prove her propensity to act in a certain way on any particular occasion. This holding is consistent with FRE 12.

ELC has also represented women who work in non-traditional blue collar jobs. One of its more recent cases in this area is *Parks v. Electricians* (N.D. Cal. C-81-3389-WHO), a case supporting women who seek apprenticeship positions in the electrical industry.

Minimum wage and overtime violations in the garment industry of San Francisco's Chinatown (*Ha v. Ho*, S.F. Sup. Ct. No. 815369) and in the homeworker attendants area (*Bonnette v. California Health & Welfare Agency*, 705 F.2d 1465 (9th Cir. (1983)) have been and continue to be priorities for ELC, especially since women have traditionally composed the majority of the workforce in these particular industries.

ELC's Work and Family Project has explored issues relating to the viability of a state parental leave law. This project focuses on issues which confront working parents on a daily basis. Pregnancy disability leave and adequate childcare are other issues broadly related to the focus of the Work and Family project.

ELC relies on community education and persuasion to achieve its goals, using litigation only when necessary. Its expert staff are in demand as speakers; its national newsletter "ACCESS" reaches over five thousand employers, rehabilitation professionals, public policy makers and advocacy groups; and its attorneys are regularly consulted on employment issues by other lawyers. ELC also produces informational materials, including model hiring procedures for the employment of disabled persons. These publications have been requested by hundreds of public and private employers.

In light of its expertise, ELC also takes on difficult appeals and writes *amicus briefs* in significant state and federal employment discrimination cases. Counsel for Lillian Garland has expertise in those subjects pertinent to the issues raised here: disability discrimination, sex discrimination, and generally, problems that face working parents.

STATEMENT OF THE CASE

Amicus Garland adopts in whole respondents' statement of the case and adds the following:

Statement of the Facts

Lillian Garland worked for petitioner, California Federal Savings and Loan (hereinafter "petitioner" or "Cal. Fed."), as a receptionist/PBX operator for three years before she took a pregnancy disability leave. Ms. Garland informed Cal. Fed. that she was pregnant and notified petitioner of her expected delivery date. After delivering by caesarean section and upon the advice of her physician, she commenced a pregnancy disability leave on or about January 18, 1982. The duration of Ms. Garland's disability leave was determined and verified by her doctor. On April 20, 1982, Approximately three months later, she reported to work. Prior to her return she notified petitioner in accordance with its employee benefit policy that she was able to return to work.[3] During this period her job had been permanently filled by an individual Ms. Garland trained prior to commencing her disability leave. She was advised by the Personnel Department at Cal. Fed. that there was no other receptionist or similar position available at that time. Stunned by her discharge, Ms. Garland sought other employment, but was unsuccessful in her efforts. It was not until seven months later, on November 17, 1982, that she accepted an offer to become a receptionist in Cal. Fed.'s Accounting Department. She returned to work on November 22, 1982.

Nature of the Proceedings Below

On May 2, 1983, California's Department of Fair Employment and Housing ("Department") served Cal. Fed. with an adminis-

---

[3]Cal. Fed. maintains a leave policy that is, on its face, gender-neutral. It provides identical benefits to all employees on leave, whether for pregnancy or for some other non-pregnancy-related disability. It, however, fails to afford female employees disabled by pregnancy a reasonable pregnancy disability leave of up to four months as required by California law. Cal. Fed.'s policy, contrary to California's general disability law (Gov. Code § 12940(a)) and its more specific pregnancy disability law (Gov. Code § 12945(b)(2)), explicitly reserves the right to fill a temporary vacancy while an employee is on disability leave, and to terminate that employee if a similar position is not available upon his/her return to work.

trative complaint filed on Lillian Garland's behalf, alleging that Cal. Fed.'s disability leave policy violated California Government Code § 12945(b)(2)[4] because Cal. Fed. failed to provide Ms. Garland a reasonable pregnancy disability leave. The complaint sought damages on behalf of Ms. Garland and an order from the Fair Employment and Housing Commission ("Commission") compelling Cal. Fed. to conform to the requirements of subsection 12945(b)(2) of California's Fair Employment and Housing Act ("FEHA"). On May 2, 1983, Cal. Fed. was also served with notice that the Commission would hold a hearing on September 15-16, 1983 on the charges made in the complaint.

On August 1, 1983, Cal. Fed. filed a complaint in the United States District Court for the Central District of California against the Department and the Commission seeking to have them enjoined from enforcing subsection 12945(b)(2) and to have the subsection declared void because it was preempted by Title VII of the 1964 Civil Rights Act, as amended, (42 U.S.C. 2000e - 2000e-17).

On September 8, 1983, the district court granted Cal. Fed.'s motion for a preliminary injunction, restraining the Department from prosecuting allegations against Cal. Fed. and the Commission from conducting hearings in connection therewith until the court reached a judgment on the merits.

On March 21, 1984, the district court ruled on the cross motions for summary judgment. The trial court denied the state of California's motion for summary judgment and granted Cal. Fed.'s motion for summary judgment, holding that subsection 12945(b)(2) was preempted by Title VII as amended by the Pregnancy Disability Act ("PDA"). The court said that by requiring up to four months leave for women, but not for men and women with non-pregnancy related disabilities, subsection 12945(b)(2) conflicted with the purpose of the PDA that female employees affected by pregnancy be treated the same as employees who are on leave with a different type of disability.

---

[4]For ease of reference, all citations herein to California's state pregnancy disability leave law and California's other disability laws which proscribe discrimination on the basis of handicap are found at California Government Code sections 12900 *et seq.*

Ms. Garland sought leave to intervene in the district court action on April 10, 1984, in order to appeal the district court's judgment of March 21, 1984, in favor of Plaintiff/Appellee California Federal Savings and Loan Association. [C.R. 40, E.R. 628.] Garland sought leave to intervene to protect her interest in the outcome of this litigation when it became apparent: (1) that neither the Commission nor the Department would appeal the district court's lack of federal subject matter jurisdiction; and (2) that neither the Department nor the Commission would take her wishes into account in deciding whether to appeal the district court's order beyond the circuit court level, should further appeal be necessary. [C.R. 42, E.R. 630-647.] Her motion to intervene pursuant to Rule 24(a)(2) was denied by Judge Manuel Real on April 16, 1984. [C.R. 50, E.R. 680-681.]

The Department and the Commission appealed Judge Real's decision to the United States Court of Appeals for the Ninth Circuit claiming that the FEHA is not preempted by Title VII. On April 16, 1985, the Ninth Circuit reversed the lower court and granted respondents' motion for summary judgment and entered a judgment in respondents' favor. The Ninth Circuit decision upheld subsection 12945(b)(2), which requires reasonable pregnancy disability leaves in California, and found it to be consistent with the purposes of Title VII, as amended by the PDA. *California Federal Savings and Loan Ass'n v. Guerra,* 758 F.2d 390 (9th Cir. 1985). Subsection 12945(b)(2) requires employers covered by Title VII to grant female employees an unpaid pregnancy disability leave of up to four months depending upon need. The court held that this provision does not conflict with the intent of the PDA which is to prohibit employers from discriminating against pregnant women in employment. (*Id.*) The court noted that the PDA does not require that the states ignore pregnancy; it does not require that women be treated exactly the same as men but that women be afforded employment opportunities equivalent to those afforded men. (*Id.*) A state law will not be preempted by Title VII when the state law furthers Title VII's purpose: equality of employment opportunities between the sexes. (Section 708 of Title VII, 42 U.S.C. § 2000e-7[5].) The court therefore concluded

---

[5]"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by

that Title VII does not preempt § 12945(b)(2) of the FEHA which guarantees women a reasonable pregnancy disability leave because such a leave is a means toward achieving the goal of equal employment opportunity.[6] The court also found that a state law which requires greater dollar expenditures for women in order to achieve equally complete health care coverage for both sexes is consistent with the Congressional intent behind the PDA that pregnant women have equal employment benefits.

SUMMARY OF THE ARGUMENT

This case involves the statutory construction of the California's Fair Employment and Housing Act (Cal. Gov. Code §§ 12900 et. seq.) which provides, *inter alia*, a reasonable disability leave of up to four months for female employees disabled by pregnancy, childbirth or related medical conditions (Cal. Gov. Code § 12945(b)(2)). Petitioner Cal. Fed. claims that the FEHA conflicts with Title VII's general prohibition against sex discrimination and its more specific prohibition of discrimination on the basis of pregnancy found in the Pregnancy Discrimination Act of 1978. In order to strengthen its claim, Cal. Fed. directs the Court's attention to *only one* subsection of the FEHA, subsection 12945(b)(2), which provides for pregnancy disability leave and conveniently ignores other sections of the FEHA which provide parallel protections to disabled individuals generally. (See, for example, Cal. Gov. Code § 12940(a).)

Subsection 12945(b)(2) does not establish leave rights for men and/or women affected by disabilities other than pregnancy. It only discusses what leaves are to be given women affected by pregnancy. In short, it does not establish two tiers of rights — one for women, the other for men or for non-pregnancy-related

---

any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

[6]For a thoughtful discussion of the equal opportunity concept see Krieger and Cooney, *The Miller-Wohl controversy: Equal Treatment, Positive Action including the Meaning of Women's Equality*, 13 Golden Gate U.L.Rev. 513 (1983), and Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L.J. 1, 27-28 (1985).

disabilities. It simply *does not discuss* what leave rights are to be afforded employees affected by disabilities other than pregnancy. Of course, other sections of the FEHA do.

Cal. Fed. nonetheless insists, in spite of the absence of supporting statutory language, that subsection 12945(b)(2) establishes a two-tiered system of employee benefits — one for pregnant women and the other for men and women affected by non-pregnancy-related disabilities. In its statement of the "Questions presented" in its petition for writ of certiorari, Cal. Fed. states the issues as follows:

> "Whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, permits disparate and more favorable treatment of employees disabled by pregnancy than of employees disabled by other medical conditions who are similar in their ability or inability to work;
>
> Whether California law, which establishes a pregnancy-based classification and which mandates that employees disabled by pregnancy receive disability leave and reinstatement rights *which employees disabled by other medical conditions are not entitled to receive,* is inconsistent with and preempted by Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978." (Emphasis added).

It is understandable that Cal. Fed. would declare that "employees [in California] disabled by medical conditions [other than pregnancy] are not entitled to receive" disability leave and reinstatement rights, for, unless it can prove that California provides benefits for its pregnant employees that it does not provide its non-pregnant employees, it cannot show that Title VII, as amended by the PDA, has been violated in California — even given Cal. Fed.'s overly literal reading of the PDA. *Yet, astoundingly, there is nothing in this record that supports Cal. Fed.'s assertion that under California law men and women disabled for reasons other than pregnancy are not provided reasonable leaves of absence and reinstatement rights.* Without substantiation of this groundless statement, Cal. Fed.'s motion for summary judgment should never have been granted and constituted error on the part of the district court.

Therefore, in her brief *amicus curiae,* Lillian Garland analyzes California's FEHA *as a whole* — not piecemeal — and places California's pregnancy disability leave subsection, Cal. Gov. Code § 12945(b)(2), in proper context: as one of *many* sections found in the FEHA which protect California's disabled employees In particular, *amicus curiae* argues that:

1. The district court erred in granting summary judgment in favor of petitioners because the lower court incorrectly assumed without a scintilla of legal analysis that California' FEHA *does not* provide reasonable disability leaves to men and women affected by non-pregnancy related disabilities.

2. This Court should consider dismissing this petition as "improvidently granted" in light of the fact that an important and relevant matter of state statutory construction — whether California's FEHA provides reasonable disability leaves for men and women affected by non-pregnancy-related disabilities — was not briefed, analyzed nor considered below.

In addition *amicus curiae* Lillian Garland argues that:

3. Even if California's FEHA provides pregnancy disability leave benefits which the state law does not provide for men and women with non-pregnancy-related disabilities, it is not preempted by Title VII, as amended, because it furthers the purpose of that act — equal employment opportunities for pregnant women.

4. The district court did not have subject matter jurisdiction over the action.

5. Should this Court find that equivalent disability leave benefits *must* be afforded women disabled by pregnancy and men and women affected by non-pregnancy related disabilities, *and should this Court find that California's FEHA considered as a whole does not provide such equivalent disability leave benefits to employees with non-pregnancy related disabilities,* then this Court should extend equivalent disability leave benefits to men and women affected by non-pregnancy-related disabilities rather than invalidate California Government Code subsection 12945(b)(2).

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PETITIONERS.

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted only where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The district court below granted summary judgment, holding that as a matter of law, Title VII of the 1964 Civil Rights Act, as amended, preempts California Government Code subsection 12945(b)(2). This holding rests on the *assumption* that § 12945(b)(2) extends more favorable treatment to women disabled by pregnancy than is available to other employees with non-pregnancy related disabilities and is therefore inconsistent with Title VII which prohibits sex-based discrimination.

This ruling was improper under Rule 56 of the Federal Rules of Civil Procedure and case law governing summary judgment because petitioner has not shown as a matter of law that the FEHA fails to require reasonable accommodation to *all* disabled employees covered under that act. Under the FEHA, employees with non-pregnancy related disabilities *are* entitled to reasonable accommodation including a leave of absence for the period of time they are disabled.[7]

---

[7]California's Government Code section 12940 provides in pertinent part:

> "It shall be an unlawful employment practice . . . (a) For an employer, because of the . . . physical handicap . . . of any person to refuse to hire or employ the person . . . "

California's Fair Employment and Housing Commission has construed this section to require "reasonable accommodation".

> "7293.9 Reasonable Accommodation.
>
> Any employer or other covered entity shall make reasonable accommodation to the physical handicap of any handicapped individual if the employer or other covered entity knows of the physical handicap, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship.
>
> (a) Examples of Reasonable Accommodation. Reasonable accommodation may, but does not necessarily include, nor is it limited to, such measures as:

Rule 56(c) states that a summary judgment shall be rendered only if the pleadings, together with other material presented to the court, demonstrates that (1) there is no genuine issue as to any material fact and (2) that the moving party is entitled to a judgment as a matter of law. The movant, in this case Cal. Fed., has the burden of proving that these requirements have been met. *Adickes v. S.H. Kress & Co.* 398 U.S. 144, 157 (1970); *Hutchinson v. United States*, 677 F.2d 1322, 1325 (9th Cir. 1982); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1300 (9th Cir. 1981). The burden on the moving party is a demanding one: "to justify a grant of summary judgment, the record must show the movant's right to it 'with such clarity as to leave no room for controversy, and must demonstrate that his opponent would not be entitled to prevail under any discernable circumstances.'" *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 442 (D.C. Cir. 1972), quoting *Semaan v. Mumford*, 335 F.2d 704, 705 (D.C. Cir. 1964). If the movant fails to satisfy this initial burden of proof, his motion for summary judgment must be denied, regardless of whether the opposing party has provided any counter evidence. *Gee v. Tennaco, Inc.*, 615 F.2d 857, 859 (9th Cir. 1980).

Examination of the record below reveals that movant Cal. Fed. failed to produce any evidence or other support for its claim that men and women affected by non-pregnancy-related disabilities are afforded no disability leave under California's FEHA. This failure of proof is fatal to Cal. Fed.'s motion because it is central to Cal. Fed.'s claim that California Government Code § 12945(b)(2) creates a leave benefit for women disabled by

---

(1) Accessibility. Making facilities used by employees readily accessible to and usable by handicapped individuals; and
(2) Job Restructuring. Job restructuring, reassignment or transfer, *part-time or modified work schedules*, . . . , and other similar actions.
. . .
. . .
. . ." (emphasis added).

Finally, in *Fischer v. Superior Court*, 177 Cal.App.3d 779 (1986), the court held that the reasonable accommodation of the disabled required by the FEHA includes *time off work* for disabilities including, hospital visits, doctor check-ups and medical recovery. *Fischer, supra*, 177 Cal.App.3d 779, 223 Cal.Rptr. 203 at 205.

pregnancy that is not available to others affected by non-pregnancy-related disabilities.

The district court accepted the validity of this assumption — that disparate treatment exists under California's disability laws — without considering those state statutory provisions which provide reasonable accommodation to female and male employees with non-pregnancy related disabilities. That the record contains no reference to such provisions renders it wholly inadequate as a basis for summary judgment. On the contrary, California's FEHA provides reasonable accommodation to non-pregnant employees equivalent to that accorded pregnant women under § 12945(b)(2). By granting summary judgment without considering these applicable provisions, the district court rendered a decision based on a fatally inadequate record.

A. The Ninth Circuit Correctly Granted Summary Judgment For Respondent Since California Law Mandates Reasonable Accommodation For All Employees, Regardless Of Sex.

Cal. Fed. bases its preemption argument on the assumption that subsection 12945(b)(2) provides benefits for pregnant women which are unavailable to men who are similar in their ability or inability to work: "Such a law requiring preferential treatment of females disabled by pregnancy and requiring employers to discriminate against male employees is in clear conflict with Title VII which mandates equal treatment." (Petitioner's Motion for Summary Judgment, p. 15.) This assumption is untrue.

1. The FEHA's pregnancy leave subsection and the FEHA's disability discrimination sections provide *all* covered disabled employees reasonable accommodation; therefore, subsection 12945(b)(2) does not conflict with Title VII, as amended by the PDA.

Section 12945(b)(2) does not conflict with the plain language of the PDA. The PDA states in pertinent part: women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment related purposes . . . *as other persons not so affected but similar in their ability or inability to work*. (Emphasis added.)

An interpretation of the PDA must begin with the language itself, for statutory language most accurately expresses the legislative purpose. See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 105 S.Ct. 658, 662 (1958). That statute says that women affected by pregnancy shall be "treated the same" for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." Petitioners have focused on this "same treatment" language, as the basis for their attack on subsection 12945(b)(2)[8] and claim that it creates a preference for female employees affected by pregnancy. Petitioners assume in their argument that because subsection 12945(b)(2) specifies leave accommodations only for women affected by pregnancy that it results in "unsame" treatment of employees not affected by pregnancy. However, petitioners make no attempt in their briefs to justify or substantiate this assumption. Only if they can prove that subsection 12945(b)(2) does, in fact, produce "unsame" treatment, can their preemption claim be sustained.

By arguing that subsection 12945(b)(2) creates employment benefits solely for women affected by pregnancy, and for no other employees, Cal. Fed. ignores the larger statutory scheme of the Fair Employment and Housing Act (FEHA), of which the pregnancy leave statute is only one part. The FEHA is a comprehensive set of statutes governing employment in California, and whether subsection 12945(b)(2) requires preferential treatment for pregnant employees must be analyzed according to leave policies that are also available within the FEHA for employees with non-pregnancy related disabilities.

---

[8]Subsection 12945(b)(2) states in relevant part: "[it is unlawful for any employer to refuse to allow a female employee affected by pregnancy . . .] to take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Reasonable period of time means that period during which the female employee is disabled."

2. California's FEHA proscribes discrimination on the basis of physical handicap.

California's FEHA extends employment protection to a broad range of individuals who are disabled.[9] "Physical handicap" within the meaning of the FEHA includes such diverse disabilities as allergic conditions, smoking related illnesses, high blood pressure, and various types of diseases. *American National Insurance v. Fair Employment*, 32 Cal.3d 603 (1982). Moreover, "handicap" includes not only current, manifest, physical disfunctions, but also conditions that may be disabling in the future but are not presently disabling. (*Id.*) The Supreme Court of California has favored an inclusive approach when determining whether new types of disabilities are to be included within the statutory definition of "handicap". (*Id.*) California therefore has adopted a liberal, expansive view of the types of disabilities covered under the FEHA.[10] Clearly, a disability suffered by a male employee that is similar to pregnancy in its debilitating effect is covered under this broad definition.

The fact is, California's FEHA requires that employees covered by that act reasonably accommodate all its physically handicapped employees and in *American National Insurance*, California's highest court decided that any condition which is "physical" and "handicapping" constitutes a physical handicap.[11] (Id.) Thus, Cal. Fed.'s assertion that California's FEHA provides for a

---

[9]See Gelb & Frankfurt, *California's Fair Employment And Housing Act: A Viable State Remedy For Employment Discrimination*, 34 Hastings L. J. 1055 (1983).

[10]"Section 12926, subdivision (h) of the act tells us that the phrase '[p]hysical handicap' *includes* [1] impairment of sight, hearing or speech, or [2] impairment of physical ability because of amputation or loss of function or coordination . . .' (Italics added.) Because in that clause the word the drafters chose was 'includes' (rather than 'means' or 'refers to,' say) we infer that the Legislature did not endorse a restrictive definition. Instead, it appears to have contemplated that the cognizant administrative officials and judges would consider *all* handicaps that are physical . . ." *American National Insurance Co. v. Fair Employment*, 32 Cal.3d 603, 608 (1982).

[11]Though the Court did not specifically decide whether temporary disabilities constitute "physical handicaps" under the FEHA, the ex-

reasonable period of leave to accommodate disabilities related to pregnancy but not for other disabilities is without foundation and contrary to current state interpretations of California's FEHA.

3. California's employment disability laws require that employers covered thereunder reasonably accommodate the physical handicap of an employee.

California law provides that employers[12] must reasonably accommodate the physical handicap of an employee, unless it can be shown that such accommodation would cause undue hardship. (Title 2, Cal. Admin. Code § 7293.9.) The rationale of this requirement is that where modifications in a job allow a handicapped individual to function as would a normal employee, and where those modifications are not unreasonably burdensome on the employer, they should be required.[13] California courts have made it clear that reasonable accommodation is a *right* to which disabled individuals are entitled. *Fisher v. Superior Court*, 177

---

tremely broad definition of the term "physical handicap" given it by the Court and other court and commission decisions indicates that they do.

[12]Employers with five or more employees are covered under the FEHA. Cal. Fed. does not dispute that it is covered under both the FEHA and Title VII.

[13]The Fair Employment and Housing Commission has described the rationale for the FEHA's requirement that employers reasonably accommodate the disabilities of their employees in many of its administrative decisions. See, for example, *DFEH v. Bay Area Rapid Transit*, FEHC Dec. No. 80-21 [CEB Precedential Decisions 1980 No. 11]. The Commission has found, referring to *Holland v. Boeing Co.*, 583 P.2d 621 (1978), that

"The physically disabled employee is clearly different from the nonhandicapped employee by virtue of the disability. But the difference is a disadvantage only when the work environment *fails* to take into account the unique characteristics of the handicapped person. See *Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 Loy. Chi. L.J. 814 (1977). Identical treatment may be a source of discrimination in the case of the handicapped, whereas *different* treatment may eliminate discrimination against the handicapped and open the door to employment opportunities." (See *DFEH v. Bay Area Rapid Transit, supra*, at p. 11, n.4 and *Holland v. Boeing, supra*, 583 P.2d 621, 623).

Cal.App.3d 779 (1986). In addition, the pertinent regulations illustrate various types of reasonable accommodation required which include "part time or modified work schedules." (Title 2, Cal. Admin. Code § 7293.9(a)(2).)

Arguably, the accommodation provided to pregnant women under subsection 12945(b)(2) is no more extensive than that provided to employees with non-pregnancy related disabilities under the FEHA's other disability laws and regulations. Both the pregnant employee and the employee with a non-pregnancy related disability are afforded *reasonable* accommodation under the FEHA. The former is entitled to reasonable accommodation which California's legislature defines as an unpaid leave of up to four months. The latter is also entitled to reasonable accommodation, which depending on the particular disability may include a disability leave and right to reinstatement. *Fisher v. Superior Court, supra*. Recognizing the recurring and relatively consistent nature of disabilities associated with pregnancy, as well as the efficiency of determining appropriate accommodation on a class-wide basis, the legislature adopted subsection 12945(b)(2) to provide a standard accommodation policy for all pregnant women. The fact that such a uniform standard has not been developed with respect to other disabilities is not an indication that those other disabilities are accorded less protection. Rather, the absence of a uniform standard reflects the impracticality of such a standard in other cases. Just as disabilities vary regarding their affect on physical ability, so do the accommodations which are tailored to meet each physical handicap. It is clear from both the language and the intent of the disability protections of the FEHA that other employees not so affected by pregnancy, but similar in their inability to work are entitled, if necessary, to accommodation of up to four months leave and reinstatement. California law therefore does not provide disparate treatment of men and women under its disability laws. Inferentially, Title VII does not preempt subsection 12945(b)(2) of the FEHA.

B. Employees Who Are Physically Handicapped Receive the Same Treatment Under California's FEHA As Employees Disabled By Pregnancy Under Subsection 12945(b)(2).

As has been stated above, it is important to view the accommodation afforded pregnant women under subsection 12945(b)(2) in the context of the entire FEHA. What subsection 12945(b)(2)

really amounts to is a statutory interpretation of "reasonable accommodation" for a certain physical handicap covered by the FEHA — the disability caused by pregnancy. Four months leave is not guaranteed by subsection 12945(b)(2); rather it requires employers to grant leave for a "reasonable period of time; provided, such period shall not exceed four months." It does not mandate a specific minimum amount of leave time; rather it establishes a method for the calculation of the minimum leave time that an employer would be required to grant to a woman affected by pregnancy. In most instances, involving uncomplicated deliveries, a woman would be disabled by pregnancy for only six to eight weeks so that the four month maximum would never come into play. However, subsection 12945(b)(2) is written broadly enough to cover the unusual situation when a female employee is disabled by childbirth for longer than eight weeks, as evidenced by a doctor's certificate, and needs to be reasonably accommodated for a longer period of time. Simply because subsection 12945(b)(2) is silent on the issue of leave time for employees with non-pregnancy related disabilities does not mean that it precludes such employees' entitlement to a similar benefit. It would be illogical for the legislature to list leave policies for men under this subsection of the FEHA, which is limited to the subject of pregnancy. Nor does the limited focus of subsection 12945(b)(2) preclude women, who are not affected by pregnancy, but disabled by some other physical condition, from receiving ample amount of leave time through the other disability provisions of the FEHA. In fact, a doctor's certificate may, in many instances, constitute a basis for employers to reasonably accommodate male or female employees disabled by conditions other than pregnancy with leaves up to four months.

Since women disabled by pregnancy or childbirth receive the same treatment as employees unable to work due to other physical handicaps, the Circuit Court's order of summary judgment for the respondent was proper.

II

DISMISSAL OF WRIT IS PROPER BECAUSE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED.

This case raises legal issues relating to the interpretation of certain sections of the FEHA; its general disability sections and its more particular pregnancy leave provision. The evident legal issue here is whether reasonable accommodation required under FEHA's general disability section 12940 is equivalent to the pregnancy disability leave benefits accorded to pregnant employees under subsection 12945(b)(2). In other words, are covered employees with non-pregnancy related disabilities entitled to receive the same disability leave benefits guaranteed to pregnant employees under subsection 12945(b)(2). While this legal issue is evident from the facts of the case and the proceedings below, this issue is not raised, briefed, or even mentioned by petitioners. Although this legal issue is inherent in the questions presented by petitioners, petitioners have offered no analysis of it. Despite the paucity of the legal record on this issue, petitioners have successfully presented legal questions to this Court on an inadequate legal record. *Amicus* Garland respectfully submits that this critical state law question must first be definitely addressed by the California Supreme Court before this Court determines petitioners' questions regarding the alleged disparate impact of the state pregnancy disability leave statute and the preemptive effect, if any, of Title VII on the California pregnancy disability leave statute. *Amicus* Garland invites the Court's attention to California decisions on the FEHA which indicate that, in fact, and as a matter of law, employees with non-pregnancy related disabilities are afforded accommodation equivalent to the leave provided to pregnant females under subsection 12945(b)(2).

It is firmly established that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." (Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, Ch. 10, § 4004, p. 507, citing United States Supreme Court Rule 17.) Upon review this Court requires that cases before it present legal and factual issues through a thorough, complete and accurate record. Plenary consideration may "shed more light on [a] case than in the nature of things was afforded at the time the petition for certiorari was considered." *Belcher v. Stengel*, 419 U.S. 118,

119 (1976), see *Supreme Court Practice,* Stern & Gressman, section 5.15 *et seq.* p. 288.

Close examination of the record of the case at bar reveals two bases for concluding that the writ of certiorari was improvidently granted. First, the record below, as well as petitioners' writ for certiorari, is conspiciously silent as to the statute regarding reasonable accommodation to which non-pregnant employees are entitled under California's FEHA. Second, the Court should avoid resolving constitutional issues where the construction of state laws make it unnecessary. If it does not and the construction of California's FEHA is ignored, the Court will be plunging into a premature consideration of constitutional issues involving the Supremacy Clause.

A. If This Court Concludes That It Is Uncertain Whether California Law Mandates Reasonable Accommodation For Employees With Non-Pregnancy Related Disabilities, Then The Writ Of Certiorari Should Be Dismissed As Improvidently Granted.

Should the Court conclude from the record below that it is not clear whether California's laws provide equal treatment of pregnant women and other disabled employees, then it should dismiss the write as improvidently granted. Undecided matters of state law are "essentially for the state court's determination", and absent guidance from the state court as to how to resolve these matters, the Supreme Court should dismiss the action as improvidently granted. *Rescue Army v. Municipal County,* 331 U.S. 549, 577 (1947).

Clearly, neither the district court nor the Ninth Circuit Court of Appeals addressed the substantive issue of whether non-pregnant employees are entitled to reasonable accommodation of their respective disabilities. In deciding that writ of certiorari was improvidently granted, the Court soundly exercises discretion "to allow the various states to serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray v. New York,* 461 U.S. 961 (1983).

The substantive issue articulated above is clearly a matter of state law. The absence of a decision by the highest state court in which a decision could be had is one basis for finding that

certiorari was improvidently granted. *Gorman v. Washington University,* 316 U.S. 98 (1942), *Gotthilf v. Sills,* 375 U.S. 79 (1963). Certiorari is improvidently granted where the "controversy primarily implicated questions of state law and presented no federal questions of substance." *Wolf v. Weinstein,* 372 U.S. 638 (1963). Where an essential issue is one of state law, this Court will not grant certiorari to consider a question of state law not yet adjudicated by the highest state court.

In the case at bar, the California Supreme Court's broad definition of "physical handicap" coupled with the California Court of Appeals' decision in *Fisher* indicates that employees with non-pregnancy related disabilities may be entitled to reasonable accommodation which is equivalent to the pregnancy disability leave benefits afforded to pregnant employees under California Government Code subsection 12945(b)(2). A decision on this issue may be forthcoming soon.[14] This Court should not now decide the questions presented in the petition for they are clearly not properly before the Court. The jurisdiction of this Court to review state court judgments extends only to final judgments rendered "by the highest court of a state in which a decision could be had," 28 U.S.C. section 1257. (See, *Hammerstein v. Superior Court of California,* 341 U.S. 491 (1951). The breadth of reasonable accommodation under the FEHA and whether it provides the same protections for male employees as it does for pregnant women, is a matter that, if unsettled, should be resolved by California courts. Petitioners' writ of certiorari should therefore be dismissed as improvidently granted.

B. Dismissal Of The Writ Of Certiorari As Improvidently Granted Based On An Incomplete And Ambiguous Factual Record Is Proper And Comports With The Court's Policy Of Avoiding Constitutional Issues If Possible.

This court has followed a policy of avoiding constitutional decisions until the issues are presented with "clarity, precision, and certainty." *Rescue Army v. Municipal Court,* 331 U.S. 549, 576 (1947). In their petition for writ of certiorari, petitioners

---

[14]See *Kingsburg Cotton Oil Company v. FEHC,* (No. F-006715). This case is currently pending before the California Court of Appeal, Fifth Appellate District.

characterize the accommodation provided to pregnant women under subsection 12945 as something which "employees disabled by other medical conditions are not entitled to." (Questions Presented, p. i.) Petitioners do not furnish evidence of the accommodation that *is* provided to such employees under California law, thus precluding this Court's opportunity to assess the validity of the claimed disparity. Furthermore, since the existence of this disparity is statutorily unfounded, certiorari was granted based on an inaccurate and misleading assertion. "In view of ambiguities in the record as to the issue sought to be tendered . . . the writ of certiorari is dismissed as improvidently granted." *Mitchell v. Oregon Food Co.*, 361 U.S. 231 (1960).

In addition, dismissal of the writ is particularly appropriate here because the constitutional issue, whether Title VII preempts the California state pregnancy leave statute because of the Supremacy Clause, need not be addressed in the first instance as petitioners would have this Court do. Instead, the Court may resolve the issues tendered by petitioners in their writ by examining whether non-pregnant employees are afforded benefits equivalent to those benefits afforded pregnant employees under California law, *before* reaching the constitutional issue. Where petitioners did not raise the statutory issues in either their petition for certiorari or in their brief, the Court should first address the statutory basis addressed in the brief of *amicus curiae* rather than decide a constitutional question. *Fry v. United States*, 421 U.S. 542, 545 n.5 (1975). This approach comports with this Court's policy of avoiding constitutional issues unless adjudication is unavoidable. *Rescue Army v. Municipal Court*, 331 U.S. 549, 569-572 (1947). In light of the inadequacy and misleading nature of the record, the writ of certiorari should be dismissed as improvidently granted.

III

TITLE VII DOES NOT PREEMPT CALIFORNIA GOVERNMENT CODE SUBSECTION 12945(b)(2) BECAUSE THE CALIFORNIA STATUTE DOES NOT CONFLICT WITH THE REMEDIAL PURPOSES OF TITLE VII'S PREGNANCY DISCRIMINATION ACT.

Amicus Curiae, Lillian Garland, adopts in whole and incorporates into this brief by reference respondents' argument in their brief on the merits which sets forth that (1) Title VII does not preempt state laws except in extremely limited circumstances, (2) equal employment opportunity is the goal of both Title VII and the Fair Employment and Housing Act, and (3) California's pregnancy disability leave statute, Cal. Gov. Code § 12945(b)(2), is consistent with Title VII, as amended by the PDA.

Even if the district court properly determined that California's FEHA provides accommodation for pregnancy disabilities and does not for non-pregnancy related disabilities, no violation of Title VII as amended by the PDA has occurred. This is true because such a statute does not disadvantage men. Men are not provided fewer job opportunities and benefits than women because the state requires that employers provide adequate leaves for women disabled by pregnancy. Since men and women are, for all practical purposes, subject to the same disabilities *except for those related to pregnancy and childbirth*, men and women will be equally advantaged or disadvantaged by an employer's disability leave policy where pregnancy diasability leave is separately provided for by statute. The contrary is of course, not true, for an employer's inadequate disability leave policy in states which do not provide for adequate pregnancy disability leaves by statute will adversely impact the employment opportunities of women, since only women are disabled by pregnancy.

For this reason, California's FEHA which provides for reasonable accommodation of disabilities related to pregnancy and childbirth, equalizes the effect of any employer's inadequate disability leave benefits between the sexes. *It does not treat women better than men.*

IV

THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISIDICTION *OVER THIS ACTION.*

In the court below, the Commission and the Department (respondents), made a motion to dismiss Cal. Fed.'s action on the grounds that there was no subject matter jurisdiction over the case, based on the decision in *Miller-Wohl Co. v. Commission of Labor and Industry,* 685 F.2d 1088 (9th Cir. 1982). [C.R. 4, E.R. 528.] The district court denied the respondents' motion and found that federal jurisdiction was present, based on the Supreme Court's decision in *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983). In *Shaw,* the court stated in a footnote that the federal courts do have subject matter jurisdiction over suits to enjoin enforcement of state statutes or regulations which are alleged to conflict with federal law. *Shaw v. Delta Air Lines, Inc., supra,* 463 U.S. 85, 103 S. Ct. 2890 at 2899, n. 14.

Amicus Garland believes in good faith that the jurisdictional issue in *Shaw* was improvidently decided, and sought intervention in this case in part to assure that this issue would, if necessary, be raised in the Supreme Court.

The jurisdictional issue in *Shaw* was neither briefed nor argued by the parties. (See 51 U.S.L.W. 3037, 81-1578.) The footnote finding jurisdiction is troubling. First, the distinction for jurisdictional purposes, between an action for an injunction, such as that in *Shaw,* and a suit for declaratory relief, as in *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983), decided the same day as *Shaw,* is "not entirely satisfying". 10A Wright & Miller, Federal Practice and Procedure, § 2767, Supp. p. 54. There is no authority of which *Amicus* is aware which supports the proposition that the form of relief requested should determine the existence of a federal question.

Secondly, the Court in the *Shaw* footnote stated in support of jurisdiction: "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." 103 S.Ct. at 2899, n.14. However, employers such as Cal. Fed. have no rights under Title VII; only employees have such rights. Yet the Court fails to distinquish cases such as *Ex Parte Young,* 209 U.S. 123 (1908) which it cites in support of the above-mentioned statement, from cases such as *Miller-Wohl,*

supra, or *Cal.Fed.,* where the plaintiff advocating preemption has had no federal right violated by state action.

And finally, none of the cases cited by the *Shaw* Court at the end of footnote 14 actually discussed the existence of jurisdiction. The Supreme Court has long held that where the jurisdictional issue has not been addressed in a case, that case will not be of precedential value on jurisdiction. *United States v. Moore,* 7 U.S. (3 Cranch) 159, 172 (1805); *Louisville Trust Co. v. Knott,* 101 U.S. 225, 236 (1903); *Hagans v. Lavine,* 415 U.S. 528, 536 n.5 (1974). In contrast, the *Shaw* footnote fails to discuss or distinguish the Court's leading decisions in *Public Service Commission v. Wyckoff,* 344 U.S. 237 (1952) or *Skelly Oil Co. v. Phillips Petroleum Co.,*339 U.S. 667 (1950).

V

IF THE COURT FINDS THAT THE LOWER COURT PROPERLY EXERCISED SUBJECT MATTER JURISDICTION OVER CAL. FED.'S COMPLAINT, THAT THE STATE LAW DISABILITY COVERAGE QUESTION WAS NOT NECESSARY TO A DISPOSITION OF THE CROSS-MOTIONS FOR SUMMARY JUDGMENT, AND THAT THE STATE PREGNANCY DISABILITY LAW IS PREEMPTED BY TITLE VII, AS AMENDED BY THE PDA, THEN *AMICUS* GARLAND ALTERNATIVELY ARGUES THAT TITLE VII REQUIRES EXTENSION OF BENEFITS.

Amicus Curiae, Lillian Garland, adopts in whole that portion of the amicus curiae brief filed by the National Organization for Women *et al.* which sets forth this "extension" argument. ("Argument", Part III, pp. 20-27.)

CONCLUSION

For all of the foregoing reasons, the Ninth Circuit Court of Appeals correctly concluded that Title VII does not preempt California's Government Code subsection 12945(b)(2). Additionally, the conclusion reached by the Ninth Circuit is correct in that both employees with non-pregnancy related disabilities and employees with pregnancy related disabilities are afforded equivalent benefits under the FEHA. Finally, in light of the inadequate record below, petitioners' writ should be dismissed as improvidently granted, and the Ninth Circuit decisions should be upheld on the grounds stated therein.

Dated: June 12, 1986

Respectfully submitted,

JOAN M. GRAFF
ROBERT BARNES
Counsel of Record
PATRICIA A. SHIU
THE EMPLOYMENT LAW CENTER
OF THE LEGAL AID SOCIETY OF
SAN FRANCISCO
1663 MISSION STREET, SUITE 400
SAN FRANCISCO, CA 94103
(415) 864-8848

Counsel of record extends sincere thanks to law students John Heller, Krishna Pettitt and Victoria Taplin for their help in preparing this brief.

AMICUS CURIAE

BRIEF

FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,

Petitioners,

—v.—

MARK GUERRA, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, THE NATIONAL WOMEN'S POLITICAL CAUCUS, AND THE COAL EMPLOYMENT PROJECT, *AMICI CURIAE*

JOAN E. BERTIN
Counsel of Record
ISABELLE KATZ PINZLER
GEORGE KANNAR
CHARLES S. SIMS

American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICI CURIAE.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....5

ARGUMENT.....10

I. LEGISLATIVE DISTINCTIONS DRAWN ON THE BASIS OF SEX AND PREGNANCY ARE INHERENTLY DANGEROUS EVEN WHEN THEY PURPORT TO CONFER ADVANTAGES.....10

A. Protective Legislation Provides A Legal Foundation For Discrimination And Has Historically Reinforced Sex-Role Stereotypes And Reduced Women's Employment Opportunities.....11

B. Section 12945(b)(2) Reflects Stereotypical Assumptions And Unnecessarily Relies On Invidious Distinctions.....23

II. IN RECOGNITION OF THE HISTORY OF SEX DISCRIMINATION, THE PREGNANCY DISCRIMINATION ACT ADOPTED A STRICT EQUALITY STANDARD TO GOVERN PREGNANCY-BASED DISTINCTIONS.....36

A. The PDA Expressly Requires That Pregnant Employees Be Treated Like Other Employees Similar In Their Ability Or Inability To Work.....36

B. The Remedial Intentions Of The California Statute Do Not Justify Provision of Benefits Only To Pregnant Women.....43

III. CAL FED IS REQUIRED TO PROVIDE LEAVE BENEFITS TO ALL EMPLOYEES ON A GENDER-NEUTRAL BASIS.....48

A. Preemption Is Not Available To Relieve Cal Fed Of Its Obligations Under §12945(b)(2), Which Can Be Harmonized With Title VII....48

B. Basic Title VII Remedial Principles Also Forbid Reducing Benefits To Cure Discrimination.....52

C. The Relief Cal Fed Seeks, Striking §12945(b)(2), Is Inconsistent With This Court's Equal Protection Cases And Would Be An Inappropriate Judicial Response To A Finding Of Conflict Between State And Federal Law.....59

CONCLUSION.....64

TABLE OF AUTHORITIES

Page

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).....52, 56

Barone v. Hackett, 602 F.Supp. 481 (D.R.I. 1984).....54

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).....13-14, 16

Brockett v. Spokane Arcades, 472 U.S. ___, 86 L.Ed. 2d 394 (1985).....10, 49

Califano v. Goldfarb, 430 U.S. 199 (1977).....61

Califano v. Westcott, 443 U.S. 76 (1979).....32, 61

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).....20

Corning Glass Works v. Brennan, 417 U.S. 188 (1974).....54

Craig v. Boren, 429 U.S. 190 (1976).....62

Dothard v. Rawlinson, 433 U.S. 321 (19771).....44

Ex Parte Collett, 337 U.S. 55 (1949)....37

Frontiero v. Richardson, 411 U.S. 677 (1973).....14, 22, 61

Fullilove v. Klutznick, 448 U.S. 448 (1980).....43, 45

Geduldig v. Aiello, 417 U.S. 484 (1974).....20, 22, 23, 37

Gilbert v. General Electric Co., 429 U.S. 125 (1976).....20, 37, 62

Goesaert v. Cleary, 335 U.S. 464 (1948).....16

Graham v. Richardson, 403 U.S. 365 (1971).....50, 60

Griggs v. Duke Power Co., 401 U.S. 424 (1971).....24, 44

Hoyt v. Florida, 368 U.S. 57 (1961).....17

Jimenez v. Weinberger, 417 U.S. 628 (1974).....61

Joseph E. Seagram & Sons, Inc. v. Hosteter, 384 U.S. 35 (1966).....50

Kansas Ass'n of Commerce & Industry v. EEOC, ___ F.Supp. ___, 33 EPD 134 (D. Kan. 1983).....57

Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973).....56

Lansdale v. Air Line Pilots Ass'n, 437 F.2d 454 (5th Cir. 1971).....20

LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972).....56

Lochner v. New York, 198 U.S. 45 (1905).....12

Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)....25, 27, 63

Maine v. Thiboutot, 448 U.S. 1 (1980)...38

Maryland v. Louisiana, 451 U.S. 725 (1981).....50

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).....60

Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Board, 467 U.S. 461 (1984).....51

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).....21, 46, 60

Muller v. Oregon, 208 U.S. 412 (1908).....14, 17

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).....20

Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).....passim

Oregon v. Mitchell, 450 U.S. 112 (1970).....37

Orr v. Orr, 440 U.S. 268 (1979).....10, 22, 47, 61

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).....20, 34

Plyler v. Doe, 457 U.S. 202 (1982).....60

Reed v. Reed, 404 U.S. 71 (1971).....16

Rice v. Norman Williams Co., 458 U.S. 654 (1982).....51

Ritchie v. Wayman, 244 Ill. 509, 91 N.E. 695 (1910).....17

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).....56

Shapiro v. Thompson, 394 U.S. 618 (1969).....50, 60

Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971).....20

Stanton v. Stanton, 421 U.S. 7 (1975)...61

TVA v. Hill, 437 U.S. 153 (1978).....38

United States v. Oregon, 366 U.S. 643 (1961).....38

United Steelworkers of America v. Weber, 443 U.S. 193 (1979).....43, 45

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).....61

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).....32, 47, 61

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980).....62

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).....17

Statutes:

California Fair Employment & Housing Act, Government Code §12945(b)(2)...passim

California Unemp. Ins. Code §2626 (Deering 1971).....20

Hawaii Rev. Stat. §392-21 (1976).....21

New Jersey Stat. Ann. §43:21-29 (West 1962).....21

New York Work. Comp. Law §205 (McKinney 1965).....21

Parental and Medical Leave Act of 1986, H.R. 4300.....33

Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2078 (1978), 42 U.S.C. §2000e(k).....passim

Rhode Island Gen. Laws §28-41-8 (1979).....21

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq.....passim

28 U.S.C. §1331.....4

28 U.S.C. §1337.....4

Legislative History:

123 Cong. Rec. (1977).....passim

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978).....passim

Committee on Labor and Human Resources, U.S. Senate, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (1979).....passim

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977).....passim

Other Authorities:

Babcock, B., Freedman, A., Norton, E., Ross, S., Sex Discrimination and The Law (1973).....12

Baer, J., The Chains of Protection (1978).....12, 13

Baker, E.F., "Protective Labor Legislation," 116 Col. U. Studies in Hist., Econ., and Pub. L. 201 (1925)....15

Breckenridge, S., "Legislative Control of Women's Work," 14 J. of Pol. Econ. 107 (1907).....16

Bureau of National Affairs, Personnel Policies Forum, Survey No. 80, "Sex and Title VII" (April 1967).....15

"Effects of Pregnancy on Work Performance," 251 Journal of the American Medical Association 1995 (April 20, 1984).....47

Equal Employment Opportunity Commission, Final Interpretive Guidelines on the PDA, 29 C.F.R. app. §1604 (1979).....57

Ginsburg, R.B., "Some Thoughts On Judicial Authority to Repair Unconstitutional Legislation," 28 Clev. St. L.Rev. 301 (1979).....63

Rudov, M. and Santangelo, N., Health Status of Minorities and Low Income Groups, DHEW Pub. No. (HRA) 79-627 (1979).....28, 30, 32

James, M., The Metropolitan Life: A Study in Business Growth (1947).....30

Kessler-Harris, A., Out to Work (1982).....12, 13, 15, 16

Kessler-Harris, A., "Recognizing Difference: The Debate over Equality for Women In the Workplace," Women and Work: An Annual Review (1985).....9

Landes, E.M., "The Effect of State Maximum Hours Laws on the Employment of Women in 1920," 88 Journal of Political Economy 476 (1980).....15

Metropolitan Life Ins. Co. Stat. Bull. (March 1976; Jan.-March 1981; July-Sept. 1981).....28, 29, 32

Myrdal, G., An American Dilemma (1944).....30

National Academy of Sciences National Research Council, Women's Work, Men's Work, (B. Reskin, H. Hartmann, eds.) (1986).....13, 15, 19, 34

National Center for Health Statistics, C.S. Wilder, ed., Disability Days, United States, 1980, Vital and Health Statistics. Series 10 - No. 143, DHHS Pub. No. (PHS) 83-1571 (1983).....25, 26, 27

Newman, L., Men's Ideas/Women's Realities (1985).....18

Santayana, G., The Life of Reason (1905-06).....11

Severo, R., "Genetic Tests by Industry Raise Questions On Rights of Workers," N.Y. Times, Feb. 3, 1980.....30

Taub, N., "Keeping Women in Their Place: Stereotyping Per Se As a Form of Employment Discrimination," 21 B.C. L.Rev. 345 (1980).....19-20

U.S. Department of Commerce, Bureau of the Census, American Women: Three Decades of Change (1983).....31

U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P-20, No. 325, "Fertility of American Women: June 1977" (1978).....33

U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P-20, No. 365, "Fertility of American Women: June 1980" (1981).....33

U.S. Department of Commerce, Bureau of the Census, Population Characteristics 6 (1979).....29

U.S. Department of Labor, An Interim Report to Congress on Occupational Diseases (1980).....28

INTEREST OF AMICI CURIAE[1]

This brief amici curiae is submitted, pursuant to Rule 36.2 of the Rules of this Court, by the American Civil Liberties Union, the League of Women Voters of the United States, the League of Women Voters of California, the National Women's Political Caucus, and the Coal Employment Project,[2] and is filed in support of neither party.

Amici, individually and collectively, have dedicated themselves in whole or in part to the advancement of the rights and interests of women in American society. Amici have been active participants in virtually all the major sex discrimination litigation in this Court, in Congressional

---

[1] The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

[2] Individual statements of interest for the amici are set forth in an Appendix to this brief.

efforts to remedy sex discrimination, in nationwide education efforts to inform lawmakers and others about sex discrimination, and in a variety of other endeavors on behalf of women. This case implicates fundamental principles and laws relating to gender discrimination, and amici believe that their position more fully represents the interests of women workers than the positions taken by either of the parties -- employers challenging a pregnancy benefit law and California officials charged with defending it.

STATEMENT OF THE CASE

Petitioners California Federal Savings and Loan Association and two employer associations (referred to collectively herein as "Cal Fed") request that this Court absolve them of responsibility for compliance with California's Fair Employment & Housing Act, Government Code §12945(b)(2), which requires

that women temporarily incapacitated as a result of pregnancy receive up to four months unpaid leave time with job security. Cal Fed, which claims that it does not provide these benefits to individuals disabled for reasons other than pregnancy, seeks to enjoin enforcement of §12945(b)(2) on the ground that it irreconcilably conflicts with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., as amended ("Title VII"), which requires that pregnant workers be treated like other employees similar in their ability or inability to work.

Construction of the meaning of Title VII, including both the rights of employees and the obligations of employers, is thus the central issue in this case. It is therefore most appropriate to rephrase the question as though it were presented in a proper Title VII lawsuit: what if a man, disabled for two months from a heart attack, sought reinstate-

ment in his prior job, but it had been permanently filled in his absence by his employer which, pursuant to §12945(b)(2), routinely granted leaves with job security to women temporarily disabled by pregnancy. The man in such a case has clearly suffered sex discrimination within the meaning of Title VII. See Newport News Shipbuilding & Dry Dock Co. v. EEOC., 462 U.S. 669 (1983). Moreover, as a remedy he is entitled to the same benefits granted pregnant employees. Title VII would plainly not permit his case to be resolved by the denial of benefits to pregnant women. No different result should occur here simply because employers, not employees, have raised the issue of Title VII's requirements.[3] California employees of both sexes should not lose the Title VII

---

[3] Cal Fed is, of course, not entitled to sue to enforce Title VII. This action was brought under 28 U.S.C. §§1331 and 1337.

rights they would be entitled to if the question had been properly--or even differently--framed.[4]

SUMMARY OF ARGUMENT

Do women require, or are they entitled to, special pregnancy-related job benefits which men do not receive because they cannot become pregnant? Is pregnancy so different a disability as to negate the Congressionally-mandated right to legal equality between the sexes in the workplace? Does the fact that pregnancy is a unique physical condition, often of great personal consequence to the women and men involved, necessarily imply that it cannot be compared to other physical conditions that may similarly affect an

---

[4] We take no position on Cal Fed's standing to challenge §12945(b)(2) other than to note that it would be anomalous, and clearly contrary to the intent of Title VII, if employers could defeat the remedial purposes of federal law designed to benefit employees simply by turning the question around and suing first.

employee's ability to work?

These questions have been answered unequivocably by Congress in the Pregnancy Discrimination Act ("PDA"),[5] an amendment to Title VII. The PDA embodies the legislative judgment that women will secure equality, equity and greater tangible benefits when legal distinctions based on sex and pregnancy are eliminated, and when the similarities in the rights and needs of both sexes are seen to override their differences. The PDA thus adopts the view that pregnancy is analogous to other temporary physical conditions that may affect an employee's ability to work. See Point II, infra.

Congress had ample reason to reject all pregnancy-based distinctions when it enacted the PDA. Historically, protective legislation like §12945(b)(2), designed to compen-

---

[5] Pub. L. 95-555, 92 Stat. 2078 (1978), codified at 42 U.S.C. §2000e(k).

sate women for the burdens imposed by pregnancy and motherhood, reinforced the distinctions between male and female workers, with powerful adverse consequences for women workers. Protectionist laws reflect an ideology which values women most highly for their childbearing and nurturing roles. Such laws reinforce stereotypes about women's inclinations and abilities; they deter employers from hiring women of childbearing age or funnel them into less responsible positions; and they make women appear to be more expensive, less reliable employees. See Point IA, infra. Recognizing this history and its legacy, Congress elected to make pregnancy comparable to other temporary physical conditions that may affect an employee's ability to work, so as to direct attention away from debilitating stereotypes about pregnant women and focus attention on workers' need for disability leave itself.

As Congress recognized, pregnancy is neither an appropriate nor rational proxy for the need for disability benefits. Overall disability data indicate that, even including pregnancy, women do not require significantly more disability leave than men, and that numerous factors other than pregnancy correlate better with work-related disability. See Point IB, infra. Even if this were not the case, the provision of sex-specific benefits is still not justifiable, since the provision of benefits on a gender-neutral basis would serve the interests of pregnant women and the state equally well. For the same reason, the statute cannot be rationalized as affirmative action. See Point IIB, infra.

The task here is to recognize the real needs of pregnant workers without at the same time destroying their right to equality in the workplace and perpetuating stereotypes

which have, for generations, cast women "into an apologetic place in relation to work."[6] The provision of special benefits for pregnant workers places women perpetually outside the mainstream of the labor force, permanently marginalizing their role as workers, and is not the answer. Instead, Title VII requires that all temporarily incapacitated workers receive the same leave benefits granted by state law to pregnant women. Cal Fed is entitled only to a declaration that its compliance with §12945(b)(2), while failing to provide analogous benefits to men, would violate Title VII, not that the two statutes conflict. Indeed, since Cal Fed could comply with both statutes by providing benefits to all workers similar in their inability to

---

[6] A. Kessler-Harris, "Recognizing Difference: The Debate Over Equality for Women In the Workplace," Women and Work: An Annual Review (L. Larwood, A. Stromberg, B. Gutek, eds.) (1985) at 142.

work but elects not to do so, the state law may not be stricken under the Supremacy Clause. Cf. Brockett v. Spokane Arcades, 472 U.S. ___, 86 L.Ed. 2d 394, 406 (1985) (federal courts must not strike state statutes where a lesser remedy would fully cure constitutional violation). Extending the statute's benefits would result in "little if any additional burden on the State," Orr v. Orr, 440 U.S. 268, 281 (1979), and would comport with Title VII and the California legislature's intent. See Point III, infra. This approach, alone, provides equality without penalty.

ARGUMENT

I. LEGISLATIVE DISTINCTIONS DRAWN ON THE BASIS OF SEX AND PREGNANCY ARE INHERENTLY DANGEROUS EVEN WHEN THEY PURPORT TO CONFER ADVANTAGES

On its face, the PDA requires pregnant employees to be treated like others "similar

in their ability or inability to work," and its legislative history reflects a similarly clear resolve to adopt an unambiguous equal treatment standard. See Point II, infra. It is not just happenstance that the PDA embraced this approach and rejected any separate or distinct legal category for pregnancy. The history of working women in America, and the legal efforts to institutionalize their differential treatment, make plain that Congress had ample reasons for legislating as it did.

A. Protective Legislation Provides A Legal Foundation For Discrimination And Has Historically Reinforced Sex-Role Stereotypes And Reduced Women's Employment Opportunities

> Those who cannot remember the past are condemned to repeat it.[7]

Earlier efforts to protect women workers were directed at the squalid and oppressive workplace conditions under which many nine-

---

[7] G. Santayana, The Life of Reason, vol.1 (1905-06).

teenth century women and men worked.[8] Debilitating economic and social conditions, together with a sometimes unrealistic hope that work was temporary, combined to make nineteenth century women less likely to form or join unions,[9] which ultimately negotiated improved working conditions for their largely male memberships. Instead, attempts to ameliorate the oppressed state of working women relied on women's childbearing and childrearing roles to justify legislation to protect them, distinctions made necessary by the inability to secure more general workplace reforms in the courts.[10] See Lochner v. New York, 198 U.S. 45 (1905).

By 1908, at least 25 states had enacted

---

[8] A. Kessler-Harris, Out to Work (1982) at 180; J. Baer, The Chains of Protection (1978) at 95.

[9] Baer, id. at 23-25, Kessler-Harris, id. at 143-44.

[10] Kessler-Harris, id. at 184-85; B. Babcock, A. Freedman, E. Norton, S. Ross, Sex Discrimination and the Law (1973) at 27-35.

some form of special protective labor laws for women workers.[11] Some restricted women from whole occupations (e.g., mining, bartending) or limited their hours of work (e.g., night work prohibitions, maximum hours restrictions).[12] Others granted women benefits which males did not enjoy, for example the entitlement to a minimum wage, to overtime pay, to lunch or rest breaks, etc.[13] All were justified on the basis of woman's special role as childbearer and guardian of home and family: "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130,141 (1873) (Bradley, J.,

---

[11] Baer, supra n. 8, at 32.

[12] National Academy of Sciences, National Research Council, Women's Work, Men's Work (B. Reskin, H. Hartmann, eds.) (1986) at 45 (hereafter "NAS Study"); Kessler-Harris, supra n. 8, at 185-86.

[13] Kessler-Harris, supra n. 8 at 181-83, 185, 187.

concurring).[14]

The classic statement in defense of gender-based legislation intended to aid women is contained in Muller v. Oregon:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her.... As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved.... [S]he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.... This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

208 U.S. 412, 421-23 (1908).

The laws enacted pursuant to this

---

[14] This type of "romantic paternalism" created "gross, stereotyped distinctions" which put nineteenth century women into a position "comparable to that of blacks under the pre-Civil War slave codes." Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (plurality opinion).

philosophy created formidable obstacles to women's full participation in the labor force, frequently failed to improve conditions for working women,[15] and may have had a discriminatory effect.[16] While some women undoubtedly benefited, overall protective legislation operated to exclude women from "male" occupations and from promotion opportunities,[17] to depress wages in female-

---

[15] For example, poor enforcement rendered the promised benefits illusory, and minimum wage provisions were often calculated beneath the poverty level. Kessler-Harris, supra n. 8, at 193-97, 211.

[16] Maximum hours legislation reduced the employment of women immigrants in particular. M. Landes, "The Effect of State Maximum Hours Laws on the Employment of Women in 1920," 88 Journal of Political Economy 476 (1980).

[17] E.F. Baker, "Protective Labor Legislation" 116 Col. U. Studies in Hist., Econ., and Pub. L. 201, 554, 564, 625-26 (1925). According to a 1967 survey of 78 companies, 18% of respondents reported that they did not hire women because of the obligations imposed by state protective laws. Bureau of National Affairs, Personnel Policies Forum, Survey No. 80, Sex and Title VII (April 1967), p. 7. See also NAS Study, supra n. 12, at 42, reporting exclusion of women from particular jobs because of assumptions that job responsibilities "would conflict with their domestic (footnote cont'd)

intensive jobs, and to limit women's earning capacity.[18] "Protective legislation divided workers into those who could and could not perform certain roles. It therefore bears some of the responsibility for successfully institutionalizing women's secondary labor force position."[19]

As a result of the stereotypes reflected in protective legislation, women were denied the right to practice law, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130; they were presumed less qualified to administer estates, cf. Reed v. Reed, 404 U.S. 71 (1971); they were restricted from bartending, Goesaert v. Cleary, 335 U.S. 464 (1948); and numerous limitations were imposed on the

---

responsibilities."

18 Kessler-Harris, supra n. 8, at 190, 193-94; S. Breckenridge, "Legislative Control of Women's Work," 14 J. of Pol. Econ. 107 (1907); Baker, supra n. 17 at 633.

19 Kessler-Harris, supra n.8, at 181.

hours and circumstances of their work, Muller v. Oregon, 208 U.S. 412 and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).[20] Some courts explicitly acknowledged the trade-off for "protection":

> It is this distinction [between the sexes], when used as a basis for legislation, which authorizes legislation exempting women from military and jury services and from working upon the public highways or working in mines, and which permits men to enjoy, alone, the elective franchise, and to hold public office, and fixes their status as the head of the family in exemption and homestead laws.

Ritchie v. Wayman, 244 Ill. 509, 91 N.E. 695, 698 (1910).

The notion of biologically-based difference, so essential to protectionism,

---

20 Even protectionist laws which granted unique benefits to women tended to perpetuate restrictive sex-role stereotypes. For example, Hoyt v. Florida, 368 U.S. 57, 62 (1961), sustained the legislative option granted to women, "the center of home and family," to refuse jury duty, "unless she herself determines that such service is consistent with her own special responsibilities."

fueled a pervasive ideology which relegated women to a separate sphere of home and family. Personality characteristics were said to flow from women's biological nature: women were characterized as nurturing, self-sacrificing, and family-oriented, and were thought unsuited to, or disinterested in, education and work outside the home.[21]

Singling out pregnancy for special treatment reinforces stereotypical attitudes which threaten women's employment status in subtle but significant ways. Psychological studies confirm that sex-role stereotyping persists and continues to harm women in hiring, training, access to promotion, career development, supervisory evaluations, and the like. A recent report of the National Academy of Sciences concludes that sex-role stereotypes, even when consciously rejected

---

[21] L. Newman, ed., Men's Ideas/Women's Realities (1985) at 17-24, 38, 76, 84, 129, 141-43.

as a basis for conduct, rest on "implicit assumptions" which "remain intact and can serve as the foundation for future, perhaps somewhat altered, sex stereotypes."[22] The notion that "women's place is in the home," although "in fundamental conflict with the reality of many women's lives .... continues to provide the foundation for beliefs about the conditions under which women should and should not do wage work."[23] These and other "unquestioned assumptions" about women continue to affect personnel decisions and "underlie the limiting of women's occupational choices."[24]

---

[22] NAS Study, supra n. 12, at 38.

[23] Id. at 38-39.

[24] Id. at 41. See also N. Taub, "Keeping Women In Their Place: Stereotyping Per Se As a Form of Employment Discrimination," 21 B.C.L. Rev. 345, 356 (1980):

> From the employer's perspective then, any heightened awareness of the worker's sexual identification is likely to interfere with a favorable evaluation of her work.

Emphasis on the biological differences between the sexes made it appear rational to treat men and women differently. Prior to enactment of Title VII, rules barring marriage and motherhood for female employees were commonplace.[25] Pregnant women were placed on mandatory maternity leave, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), and were denied accrued seniority and other benefits. Cf. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). Pregnancy was widely excluded from employment-related health insurance and disability plans. Gilbert v. General Electric Co., 429 U.S. 125 (1976), Geduldig v. Aiello, 417 U.S. 484 (1974).[26]

---

25 E.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) (per curiam); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971); Lansdale v. Air Line Pilots Ass'n, 437 F.2d 454 (5th Cir. 1971).

26 Similarly, of the five states which provided workers with paid benefits for temporary disability when the PDA was enacted, four either denied or limited pregnancy benefits. See Cal. Unemp. Ins. Code (footnote cont'd)

In recent years, this Court has demonstrated increasing sensitivity to the discriminatory effects of sex-role stereotyping and the ways in which sex-based categorizations systematically undermine the rights of women. "Archaic and overbroad generalizations" about dependency, the value of women's work, different needs and characteristics of males and females have all been rejected. See Mississippi University for Women v. Hogan, 458 U.S. 718, 725-26 (1982), and cases cited therein. The Court has not been deterred by the apparent ameliorative effect or intent of gender-specific laws:

> Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection.'

---

§2626 (Deering 1971); N.J. Stat. Ann. §43:21-29 (West 1962); N.Y. Work. Comp. Law §205 (McKinney 1965); R.I. Gen. Laws §28-41-8 (1979). But see Hawaii Rev. Stat. §392-21 (1976).

Orr v. Orr, 440 U.S. at 283 (citation omitted). Thus, while "assisting needy spouses is a legitimate and important governmental objective ... [t]here is no reason ... to use sex as a proxy for need. Needy males could be helped along with needy females with little if any additional burden on the State." Id. at 280-81.[27]

In the sex discrimination context, the provision of "special benefits" has "put women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. at 684 (plurality opinion). Protection is at best only ambiguously beneficial to women; historical evidence reveals compellingly that it has always carried concealed costs. Moreover, any doctrine resting upon the

---

[27] Equal protection cases are instructive, even though the legal standard for evaluating pregnancy discrimination claims may differ under Title VII. Compare Geduldig v. Aiello, 417 U.S. 484 (1974) with Newport News, 462 U.S. 669. (With regard to the questionable continuing vitality of Geduldig, see n. 51, infra.)

incomparability of the sexes because of biological differences cannot be confined to circumstances which may at first appear "beneficial"; the principle can always then be turned to justify the denial of rights. See, e.g., Geduldig v. Aiello, 417 U.S. 484.[28]

B. Section 12945(b)(2) Reflects Stereotypical Assumptions And Unnecessarily Relies On Invidious Distinctions

In defending §12945(b)(2) in the Ninth Circuit, the state argued that an employer's failure to grant at least four months disability leave for pregnancy will inevitably have a disparate effect on women.[29] This

---

[28] California's own statutes treat pregnancy apparently better for this purpose, but worse for others. For example, one statute directed at employers not covered by Title VII appears to permit discrimination against pregnant women in job training programs under certain circumstances (§12945(a)), and another places a six-week maximum only on paid leave for pregnancy (§12945(b)(1)).

[29] Even if this were true, that fact would still not justify this statute, since the remedy for neutral (footnote cont'd)

argument assumes that men and women experience all other disabilities essentially equally, except that in addition women become pregnant. Thus, it is asserted, once the state compensates for pregnancy, men and women can compete on a par.

This argument lacks a factual predicate both in the record in this case,[30] and more generally. For example, even though the average greater longevity of women may provide an apparently "objective" rationale for charging women more for pension contributions or paying them lower periodic benefits, it ignores many other more pertinent and less

---

rules with disparate effects is the elimination of the discriminatory device - not just for the victims of discrimination, but for everyone. E.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971), and see Point IIB, infra.

[30] It is troublesome that, without proof, the state is willing to confirm what has been said all along by the practitioners of discrimination - that pregnancy renders women less reliable, less productive employees, absent more often, more expensive, etc. - i.e., fundamentally different and handicapped.

invidious factors which predict longevity. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708-11 (1978). Similarly, the fact that only women become pregnant reveals nothing about the nature and extent of work-related disability or the actual impact of the denial of leave benefits on the two sexes. In fact, the average number of days lost from work due to disability, including childbirth and illness during pregnancy, is remarkably similar for men and women workers. The National Center for Health Statistics has calculated that,

> currently employed persons 17-64 years of age experienced 5.0 days lost from work per person per year. The rates of time lost from work were approximately the same for males and females.... The highest rate of work loss was reported for males 55-64 years of age.[31]

---

[31] National Center for Health Statistics, C.S. Wilder, ed., Disability Days, United States, 1980. Vital and Health Statistics. Series 10 - No. 143, DHHS Pub. No. (PHS) 83 - 1571 (1983) at 6 (hereafter "Disability Days"). For purposes of this study, women on (footnote cont'd)

Men workers experience an average of 4.9 days of work loss due to illness or injury per year while women experience 5.1 days per year. This extremely small difference of 0.2 days makes sex the least useful predictor of risk of work loss due to disability. All of the other population characteristics researched by the National Center for Health Statistics, including occupation, age, race, place of residence, income, and perceived health status, are better predictors than sex of days lost from

---

pregnancy leave were considered to be currently employed. Even assuming that some women voluntarily or involuntarily leave their jobs because of or in anticipation of pregnancy, the disability rates for men and women ages 17-64 are still remarkably similar. Among persons not in the work force, men experienced 14.8 days of bed disability compared to 11.5 days for women and men had 45.8 days of restricted activity compared to 30.5 for women. Of persons currently unemployed, men experienced 8.0 days of bed disability compared to 9.5 for women, and men had 30.7 days of restricted activity compared to 25.3 for women. (Id. at 42.)

work due to disability.[32]

This general proposition holds true even during the prime childbearing years. In the age group 17-24, men experience 4.8 days lost from work per person per year, while women have only 4.4 days. In the age group 25-34, the figures are 4.9 days for males and 5.2 days for females.[33]

Numerous factors influence disability occurrence. For example, lower income men workers experience more disability than lower-income women workers,[34] men lose more

---

[32] Even if the generalization were true that, on average, women are disabled from work more than men, it would still be impossible to predict which women (and men) will be disabled more, or less, than average. The generalization thus serves to obscure the important fact of individual variability. Cf. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702.

[33] Disability Days, supra n. 31, at 39.

[34] Work disability rates rise as income decreases, (footnote cont'd)

work days from all injuries than women,[35] and they suffer more job-related injuries and diseases.[36] The number of disability weeks (from any cause, including pregnancy) was greater for men than women in a study of office and sales employees ages 17-64.[37]

more for men than women: 101 per 1,000 men earning $5,000-$6,999 are work-disabled, compared to 42.6 per 1,000 women; at incomes over $15,000, the rates are 55.9 per 1,000 men and 54.3 per 1,000 women. "Work Disability By Income," 57 Metropolitan Life Ins. Co. Stat. Bull. (March 1976) p.8.

[35] Per 100 currently employed persons, men lost 128.9 days per year from injuries while women lost only 68.8 days. M. Rudov and N. Santangelo, Health Status of Minorities and Low Income Groups, DHEW Pub. No. (HRA) 79-627 (1979), p. 155, (hereafter "Rudov and Santangelo").

[36] U.S. Department of Labor, An Interim Report to Congress on Occupational Diseases (1980), Table I-16, 49-50.

[37] "Variation in Duration of Disability Among Metropolitan Employees," 62 Metropolitan Life Ins. Co. Stat. Bull. (July-Sept., 1981) p.9. In this study women ages 17-44 have more annual days of disability than do males of the same age, but men ages 45-64, experience more disability days. The same pattern exists for average duration of disability in office workers, but among sales personnel males of all ages

Even though pregnancy and childbirth always entail some period of disability, that does not prove that women as a class require disability leave more than men. In certain work environments in which males and females aged 40-65 predominate, the disability rate may be greater for men than for women, and those disabilities experienced by women are unlikely to be related to pregnancy.[38] In workplaces with a younger population, pregnancy-related disabilities might predominate. The pattern may vary by place of employment, locality, geographical region, age, ethnic

experience longer disabilities than do females. 62 Metropolitan Life Ins. Co. Stat. Bull. (Jan.-Mar. 1981), pp. 5-6, Tables 1,2.

[38] Of all women aged 55-59 in the workforce in 1978, almost 70% had had their last child by age 34; more than 90% had had their last child by age 39. U.S. Department of Commerce, Bureau of the Census. Population Characteristics 6, Table 15 (1979).

background, and other factors.[39] That we have tended to view pregnancy as the single overriding factor in measuring the need for disability benefits speaks only to the power of tradition and stereotypes: the time-honored tendency to use sex-based distinctions in the place of other more functional categories,[40] and the view of pregnancy as a uniquely incapacitating "delicate

---

[39] For example, blacks experience sickle cell disease, and are at greater risk for hypertension. See Rudov and Santangelo, supra n. 35, at 103. Members of other ethnic groups may experience increased risk for certain conditions as a result of genetic factors. R. Severo, "Genetic Tests by Industry Raise Questions On Rights of Workers," N. Y. Times, Feb. 3, 1980. Age, diet, exercise, work environment, and personal habits may also affect the incidence of temporary disability.

[40] Race-based tables were once common in the insurance industry, and were supported by statistical data correlating race with increased risk for the insured event. M. James, The Metropolitan Life: A Study In Business Growth 338 (1947), G. Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 316-17, 955, 1262-63 (1944). They have been abandoned not only for legal and policy reasons, but also because functional classifications work as well.

condition" and women as frail, passive and needy of protection.

Moreover, §12945(b)(2) does not begin to address other equally or more pressing needs of working women; it draws attention away from them by creating the illusion that "women's problems" have been solved. But the average woman bears only two children, and working women have fewer children than non-working women.[41] Pregnancy, while experienced by many or even most women, is still an event which occurs infrequently in the lives of individual women, and is physically disabling for a limited time period.[42] But all workers

---

[41] U.S. Department of Commerce, Bureau of the Census, American Women: Three Decades of Change (1983) pp. 6-8.

[42] In a study of the annual incidence of disability among female Metropolitan Life Insurance Co. office and sales personnel ages 17-64, pregnancy represented about 20% of cases for office workers and 13% for (footnote cont'd)

experience various unpredictable temporary conditions which prevent them from working, and parents of both sexes need leave time to meet the needs of their dependents.[43] Poor people disproportionately experience many chronically disabling conditions.[44] The availability of pregnancy-specific leave benefits is irrelevant to them, to women who do not work during pregnancy,[45] and to

---

sales workers. Pregnancy accounted for 25% of total days of disability taken by office workers and 13% for sales workers. Pregnancy-related disability represents a greater proportion of disability days and incidence among women 17-44, and is neglible for women ages 45-64. 62 Metropolitan Life Ins. Co. Stat. Bull. (Jan.-Mar. 1981), pp. 5-6, Tables 1,2.

43 Discrimination against either parent can equally injure dependent family members. Califano v. Westcott, 443 U.S. 76 (1979), invalidated a provision of the Social Security Act which keyed benefits to the sex of the unemployed parent, noting that the sex of the unemployed breadwinner parent was irrelevant to the legislature's goals: "[i]n either case, the family's need will be equally great." Id. at 88. See also Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

44 Rudov & Santangelo, supra n. 35, at 135-37.

45 Only 1.1% of blue collar women and 2.9% of sales (footnote cont'd)

women beyond childbearing age. Mothers who rely in whole or in part on a spouse or family member's wages would be better served by benefits covering that wage earner in the event of any disability.[46]

If pregnant women are disadvantaged because employers do not guarantee disability leave, it is not because they are disproportionately

---

and clerical workers over the age of 30 expected to bear a child within a year. U.S. Dep't of Commerce, Bureau of the Census, "Fertility of American Women: June 1977," Current Population Reports, Series P-20, No. 325, Table B at 3 (1978). Other women voluntarily leave the labor force during or in anticipation of pregnancy. U.S. Dep't of Commerce, Bureau of the Census, "Fertility of American Women: June 1980," Current Population Reports, Series P-20, No. 365, (1981).

46 Indeed, in recognition of this problem, a bill has been introduced in Congress to provide all workers the right to unpaid leave of absence with job security for illness, temporary physical incapacity, or work loss because of the need to care for a newborn, newly-adopted or seriously ill child. Parental and Medical Leave Act of 1986, H.R. 4300. The impetus for this legislation derives in substantial part from the concern of some legislators that sex-specific measures, like §12945(b)(2), are not harmonious with Title VII and, in any event, are an inadequate response to the problems encountered by all employees.

disabled, but more likely because their requests to return are discriminatorily refused. The history of exclusionary treatment based on pregnancy is too recent to be easily extinguished as a factor in employer decisions. Stereotypes about the greater unreliability of mothers of infants or young children still abound.[47] Left to their discretion, employers may well be less likely to accommodate the disabilities of pregnancy than those of other illnesses, not because of the uniqueness or special needs of pregnancy but because of a reluctance to employ new mothers. E.g. Phillips v. Martin Marietta Corp., 400 U.S. 542. The notion that women need special treatment because of biological differences thus

---

[47] See, generally, NAS Study, supra n. 12.

masks covert but intentional gender discrimination against women both as childbearers and parents. While the legislature is free to offer solutions to such discrimination, it must do so in a non-discriminatory fashion. In the long run women will benefit more from laws which prohibit any discrimination on the basis of sex than those which require preferential treatment and reinforce invidious stereotypes.[48]

---

[48] "[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace." S. Rep. No. 95-331, 95th Cong., 1st Sess. 3 (1977) (hereafter "S. Rep. 95-331"), reprinted in Legislative History of the Pregnancy Discrimination Act, 1978 (committee print prepared for the Senate Committee on Labor and Human Resources) at 40 (1979) (hereafter "Leg. Hist.").

II. IN RECOGNITION OF THE HISTORY OF SEX DISCRIMINATION, THE PREGNANCY DISCRIMINATION ACT ADOPTED A STRICT EQUALITY STANDARD TO GOVERN PREGNANCY-BASED DISTINCTIONS

A. The PDA Expressly Requires That Pregnant Employees Be Treated Like Other Employees Similar In Their Ability Or Inability To Work

The PDA, a definitional amendment to Title VII, makes it "clear that sex discrimination includes classifications based on pregnancy."[49] The PDA states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. §2000e(k) (emphasis added).

---

[49] 123 Cong. Rec. S.4145 (daily ed. March 15, 1977) (remarks of Sen. Mathias), Leg. Hist. at 8.

The PDA was enacted to reverse legislatively the decision in Gilbert v. General Electric Co, 429 U.S. 125 (1976), that an employer's exclusion of pregnancy from its disability insurance program did not constitute sex discrimination under Title VII. Instead, Congress embraced the view of the dissenters in Gilbert[50] to the effect that discrimination on the basis of pregnancy is per se sex discrimination within the meaning of Title VII.[51]

The intent of the PDA is clear from its plain language, and is thus controlling without reference to legislative history. Ex Parte Collett, 337 U.S. 55, 61 (1949); see

---

[50] S. Rep. 95-331 at 2-3, Leg. Hist. at 39-40; H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 2 (1978), (hereafter "H.R. Rep. 95-948"), Leg. Hist. at 148, cited in Newport News, 462 U.S. at 678 nn. 15, 16.

[51] Indeed, it is arguable that, in light of Congress' power to enforce the Fourteenth Amendment, Oregon v. Mitchell, 450 U.S. 112, 127 (1970), the Court's conclusion to the contrary in Geduldig v. Aiello, 417 U.S. 484, is no longer good law.

also Maine v. Thiboutot, 448 U.S. 1, 6 n.4 (1980); TVA v. Hill, 437 U.S. 153, 184 n. 29 (1978); United States v. Oregon, 366 U.S. 643, 648 (1961). The legislative history, however, confirms what is plain on the face of the statute: that Congress did not intend to grant pregnancy preferential status vis-a-vis other disabilities, or to create or permit any separate legal classification for it. The clear intent was to require that it be accorded the same treatment given analogous physical conditions experienced by non-pregnant workers. The legislative history is replete with references to the fact that "[t]he key to compliance in every case will be equality of treatment."[52]

> Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.[53]

Senator Javits noted that employers were not required by the PDA to provide any specific benefits to pregnant employees:

> ... the bill adopts as its standard equality of treatment, and thereby permits the personnel and fringe benefit programs already in existence for similar conditions to be the measure of an employer's duty toward pregnant employees.[54]

Senator Brooke specifically rejected the notion that the PDA would grant pregnant workers an entitlement to special benefits:

---

[52] 123 Cong. Rec. S.29385 (daily ed. Sept. 15, 1977) (remarks of Sen. Williams), Leg. Hist. at 63.

[53] S. Rep. 95-331 at 4, Leg. Hist. at 41 (emphasis added).

[54] 123 Cong. Rec. S.29387 (daily ed. Sept. 15, 1977) (remarks of Sen. Javits), Leg. Hist. at 67. Accord, 123 Cong. Rec. S.29388 (daily ed. Sept. 15, 1977) (remarks of Sen. Bayh), Leg. Hist. at 68; 123 Cong. Rec. S.29663 (daily ed. Sept. 16, 1977) (remarks of Sen. Culver), Leg. Hist. at 133.

> ... S.995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men.[55]

Congress recognized existing state laws regulating pregnancy benefits either as "(1) a provision for coverage in some form under a state disability insurance law [or] (2) a requirement of equal treatment of pregnant workers under a State fair employment practices law."[56] California was characterized as providing "[c]overage for complications of pregnancy and childbirth on same basis as other disabilities. Disability associated with normal childbirth - maximum coverage of three weeks before and three weeks after

---

[55] 123 Cong. Rec. S.29664 (daily ed. Sept. 16, 1977) (remarks of Sen. Brooke), Leg. Hist. at 135 (emphasis added).

[56] H.R. Rep. 95-948 at 10, Leg. Hist. at 156.

childbirth."[57] The debates fail to evidence Congressional approval (or even recognition) of any state statute that might be construed to provide preferential, or unequal treatment, for pregnant workers. The entirety of the Congressional debate and the plain language of the statute consistently demonstrate a contrary intent.

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, this Court's first and only interpretation of the PDA, confirms this interpretation. There, the Court held that a health insurance plan limiting coverage for pregnancy-related expenses incurred by spouses of employees, although not by employees themselves, "violates Title VII by discriminating against male employees." Id. at 684. The Court had no difficulty recognizing the discrimination against men,

---

[57] H.R. Rep. 95-948 at 11, Leg. Hist. at 157.

who received less comprehensive insurance benefits than their female counterparts:

> . . .[C]ongressional discussion focused on the needs of female members of the work force rather than spouses of male employees. This does not create a "negative inference" limiting the scope of the Act to the specific problem that motivated its enactment. . . . Congress had always intended to protect all individuals from sex discrimination in employment - including but not limited to pregnant women workers.

Id. at 679-81 (citations and footnote omitted).

Thus, the PDA, its legislative history, and Newport News make clear that any differential in benefits based on pregnancy constitutes sex discrimination. Denying men benefits which women receive or treating women differently because they become pregnant runs afoul of Title VII's prohibition against sex discrimination.

B. The Remedial Intentions Of The California Statute Do Not Justify Provision Of Benefits Only To Pregnant Women

Sex conscious remedies, like those designed to ameliorate race discrimination, are clearly necessary and lawful under appropriate circumstances. E.g., Fullilove v. Klutznick, 448 U.S. 448 (1980), United Steelworkers of America v. Weber, 443 U.S. 193 (1979). The approach adopted by §12945(b)(2), however, fails to qualify either as a remedy for hypothetical disparate impact from the denial of adequate leave benefits or as affirmative action, most particularly because the gender neutral provision of benefits will serve the interests of the state and women workers equally well.

The State assumes, without proof,[58] that

---

[58] Even assuming that adverse impact from the operation of a neutral rule could ever be assumed without factual proof, it would not be appropriate in this case, since it is not clear that denial of leave (footnote cont'd)

women are disproportionately disadvantaged by the denial of disability leaves. Even if this were true, the appropriate remedy would be substitution of a truly neutral employment practice for the apparently-neutral (but actually discriminatory) policy. Facially neutral but discriminatory practices (which are not necessary to the business operation or are not predictive of successful job performance) are routinely invalidated for all employees, not just for the victims of discrimination.[59] Thus, even if inadequate leave policies had a disparate effect on women, the appropriate remedy is gender-neutral leave.

Affirmative action is appropriate "to

---

benefits always affects women worse than men. See Point IB, supra.

[59] See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (eliminating unvalidated intelligence tests), and Dothard v. Rawlinson, 433 U.S. 321 (1977) (height requirement which discriminated against women eliminated for men as well.)

break down old patterns of ... segregation and hierarchy" and "to 'open employment opportunities ...'"; it may not "unnecessarily trammel the interests of [other] employees", and it must be "a temporary measure; ... not intended to maintain ... balance, but simply to eliminate a manifest ... imbalance." United Steelworkers of America v. Weber, 443 U.S. at 208 (citation and footnote omitted).[60] Moreover,

> [t]he issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit

---

[60] In Fullilove, the Court upheld the 10% set-aside for minority contractors on the theory that it partially offset the discrimination operating against them in the marketplace, which will presumably diminish over time, eliminating the need for the remedy. In contrast, the "disadvantaged" status of women is attributable not to outside forces, but to immutable biological ones, purportedly making women permanently incapable of competing with men. Unlike the minority set-aside case, where the "benefit," government contracts, could not be granted to everyone and the "scarce resource" had to be allocated to insure fairness, leave benefits can be made available to anyone who is disabled. Pregnant workers lose nothing by the gender-neutral provision of benefits.

> only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Mississippi University for Women, 458 U.S. at 731 n.17 (emphasis added).

Affirmative action and preferential treatment are thus appropriate when neutral rules or procedures will not redress the injuries caused by discrimination. For example, long-standing discrimination against a particular group may result in severe underrepresentation and its consequential harms,[61] a problem which cannot be remedied simply by treating everyone equally in the future.

But these principles have no application here. The California statute makes no attempt to remedy past discrimination. Rather it presumes that members of one sex

---

[61] E.g., perpetuation of a hostile work environment, isolation of minority or female employees, etc.

"suffer from an inherent handicap."[62] But such a presumption is per se "illegitimate." Id. at 725.

> 'Thus, the gender-based distinction is gratuitous; without it the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids,' ... and the effort to help those women would not in any way be compromised.

Orr v. Orr, 440 U.S. at 282 (quoting Weinberger v. Wiesenfeld, 420 U.S. at 653).[63]

---

[62] Pregnancy may or may not "handicap" a woman. Physical and emotional responses may vary widely among individuals, as may the ability to perform accustomed tasks. "Our culture ... provides ... expectations of the physical and emotional" aspects of pregnancy, but "we have no data" to support many "stereotype[s]." Attention to "individual demands and capabilities" is essential. "Effects of Pregnancy On Work Performance," 251 JAMA 1995-96 (April 20, 1984).

[63] The argument that §12945(b)(2) is necessary to protect women's procreative choice, pressed by some amici in support of the state, is properly met by the same response. To the extent that women may be deterred from bearing children by the possibility that they will lose their jobs, protection for both sexes from job dismissal would be curative. Men, too, might be deterred from having children if they knew that they might be fired and unable to provide for their families' support if they became sick or disabled.

III. CAL FED IS REQUIRED TO PROVIDE LEAVE BENEFITS TO ALL EMPLOYEES ON A GENDER-NEUTRAL BASIS

A. Preemption Is Not Available To Relieve Cal Fed Of Its Obligations Under §12945(b)(2), Which Can Be Harmonized With Title VII

Cal Fed essentially asks the Court to declare whether an employer which complies with §12945(b)(2), but provides no analogous benefits to employees temporarily incapacitated for reasons other than pregnancy, would be violating Title VII. As shown above, the answer to that question is clearly yes. But the employers seriously err in suggesting that, in these circumstances, they are entitled to an order striking down §12945(b)(2) and denying benefits to millions of women whom the California legislature has found entitled to them, and who are not even before the Court. Instead, the employers are entitled to no more than the declaration that their mere compliance with the state statute, without more, would place them in violation

of Title VII. Since they may comply with §12945(b)(2) and Title VII by providing equal benefits to both sexes, the California statute may not be held preempted.

Title VII contains its own preemption provision which plainly reveals that Cal Fed is not entitled to the remedy it seeks:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

42 U.S.C. §2000e-7 (emphasis added).[64] Since

---

[64] The legislative history of the PDA contains nothing which would call into question the plain language of §2000e-7:

> Mr. Hatch. Do the managers and sponsors of this bill intend S. 995 to be preemptive of State laws....
> Mr. Williams. If there were clear conflicts ... and the states attempted to permit what this legislation ... would prohibit, obviously the Federal law would prevail....

123 Cong. Rec. S. 29643-4 (daily ed. Sept. 16, 1977), Leg. Hist. at 78-79. See also S. Rep. 95-331 at 3 (footnote cont'd)

§12945(b)(2) neither "requires" nor "permits" discrimination,[65] and since compliance with both statutes is possible, Title VII neither authorizes preemption of §12945(b)(2) nor exempts employers from compliance with it.

Reference to standard preemption doctrine yields the same result. Preemption of state law by federal action is not to be presumed lightly, Maryland v. Louisiana, 451 U.S. 725 (1981), nor manufactured. Joseph E. Seagram & Sons, Inc. v. Hosteter, 384 U.S. 35 (1966). Cf. Brockett v. Spokane Arcades, 472 U.S. ___, 86 L.Ed. 2d 394. (state statute may not be struck where lesser remedy would cure

---

n.3, Leg. Hist. at 40 n. 1: "[T]itle VII does not preempt State laws which would not require violating Title VII...." (emphasis added).

65 Cf. Shapiro v. Thompson, 394 U.S. 618 (1969) (Social Security Act provision indicating disapproval of any state welfare plan which required more than one year's residence for eligibility neither required nor permitted the one-year state residency requirement challenged in that case); Graham v. Richardson, 403 U.S. 365 (1971) (Social Security Act requirement that benefits be available to all citizens neither required nor permitted discrimination against non-citizens).

constitutional violation). The critical question

> is whether there is an irreconcilable conflict ... A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal... policy.

Rice v. Norman Williams Co., 458 U.S. 654, 658-59 (1982) (emphasis added). Here, Cal Fed is not compelled to provide leaves only to pregnant women; it limits the benefit to them out of choice. Thus, it cannot be said that compliance with both statutes is impossible, Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Board, 467 U.S. 461 (1984), or that §12945(b)(2) "mandates or authorizes conduct that necessarily constitutes a violation of [federal anti-discrimination] laws in all cases." Rice v. Norman Williams, 458 U.S. at 661.

Since preemption does not apply, both §12945(b)(2) and Title VII remain intact and

employers remain obligated to comply with both statutes by providing gender-neutral leave benefits.

B. Basic Title VII Remedial Principles Also Forbid Reducing Benefits To Cure Discrimination

Title VII requires that victims of discrimination receive "make whole" relief which will restore them to their "rightful place," where they would have been in the absence of discrimination. E.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-20 (1975). An employer which complies with §12945(b)(2) to the extent of providing benefits only to incapacitated pregnant women, if sued under Title VII by a temporarily disabled man, would clearly be required to provide the same benefits to the man. Newport News, 462 U.S. 669.

In Newport News Title VII's remedial principles applied in two separate

situations, both times to upgrade employees' benefits, first for women, then for men. The original benefit plan contained an overall "limitation on hospital coverage for pregnancy that did not apply to any other hospital confinement." 462 U.S. at 672. As a result of the PDA, the plan was amended to equalize hospital coverage for female and male employees by upgrading the benefits women workers received to include full coverage for pregnancy. Id. The employer failed, however, to equalize dependents' benefits, resulting in discrimination against male employees, which, as in this case, had "'its genesis in the gender-based distinction accorded to female employees.'" Id. at 672 n.7 (reference omitted). Discrimination occurred, against one sex or the other, so long as a pregnancy distinction remained, and was only remedied by providing pregnancy-related benefits to both female employees and

spouses of male employees.[66]

Title VII was never intended to diminish any employee's benefits:

> ... the objective of equal rights legislation 'is not to drag down men workers to the ... levels of women, but to raise women to the levels enjoyed by men.' As the Supreme Court has observed ..., 'To require that depressed wages be raised [is] ... a matter of simple justice to the employees.' (Corning Glass Works v. Brennan, 417 U.S. 188, 207 (emphasis supplied)). These principles apply equally to [the PDA].[67]

Indeed, Congress assumed that "ordinary Title VII remedial principles" would always require upgrading the benefits received by the victims of discrimination:

---

[66] Similarly, in Barone v. Hackett, 602 F. Supp. 481 (D. R.I. 1984), a case brought by female employees and the Dept. of Justice to remedy the discrimination from the failure of Rhode Island to provide pregnant employees with the same disability benefits enjoyed by others, extension of benefits - not their withdrawal - was granted, notwithstanding the extensive monetary obligation imposed on the state.

[67] S. Rep. 95-331 at 8, Leg. Hist. at 45 (emphasis added). Accord, H.R. Rep. 95-948 at 9, Leg. Hist. at 155.

> In all of the pre-Gilbert pregnancy cases, for example, this always meant requiring the employer to pay the women discriminated against more, rather than paying the other employees less.[68]

This explanation clarified the time limitation contained in Section 3 of the PDA, which explicitly forbade employers from reducing any benefits for a year.[69] Congress did not intend to "freeze benefit plans in existence" at the time the PDA was enacted, because "there are many reasons why employee

---

[68] S. Rep. 95-331 at 8, Leg. Hist. at 45.

[69] Section 3 requires Cal Fed to extend the benefits of §12945(b)(2) to all disabled employees:

> ... the time limits in section 3 cover good-faith employers who come into compliance with the bill once it becomes law; these time limits must not be construed as permission for employers who do not comply immediately to reduce benefits once the time limits have run.

S. Rep. 95-331 at 8, Leg. Hist. at 45 (emphasis added). Non-complying employers would thus not be granted perpetual immunity from §3 simply because of its expiration, as Cal Fed seems to suggest. The Brief of National Organization for Women, et al., amici curiae, presents this argument in detail, and we subscribe to the views expressed therein.

fringe benefit plans are altered in a way which could reduce benefits to some employees."[70] Congress only contemplated changes in benefit packages after the expiration of one year if "the employer can demonstrate [they] are for reasons entirely independent of this bill."[71]

Since nothing in §12945(b)(2) precludes an employer from granting men leaves for disability, it would provide no basis on which employer liability to male employees could be limited or denied.[72] In addition,

---

[70] H. R. Rep. 95-948 at 8, Leg. Hist. at 154.

[71] Id.

[72] This case is therefore unlike earlier cases in which employers denied women employment opportunities pursuant to explicit restrictions contained in state protective laws. E.g., Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir., 1973); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971). In Albemarle Paper Co. v. Moody, 422 U.S. at 423 n.18, this Court declined to rule on these courts' unwillingness to provide backpay, in addition to declaratory relief, since the employers had acted under compulsion of state law.

Albemarle Paper Co. v. Moody, 422 U.S. 405, eliminated good faith as a basis for limiting Title VII monetary liability and forecloses any argument here that §12945(b)(2) would operate as a defense to an action by disabled male employees or would limit their recovery.

Section 12945(b)(2) does not require that California employers give leaves only to pregnant women. It essentially established a floor on benefits, and Title VII requires their equalization.[73] Cal Fed argues, in essence, that since it does not comply with state law it should receive preferred status, and not be required to provide any benefits, a result it claims is mandated by Title

---

[73] The Equal Employment Opportunity Commission's (EEOC) Final Interpretive Guidelines on the PDA, 29 C.F.R. app. §1604 (1979), Questions 29 and 30 support this interpretation. The Guidelines indicate that an employer who provides pregnancy-related benefits must, under the PDA, upgrade the benefits for employees affected by other incapacitating conditions to the same level. See also Kansas Assn. of Commerce & Industry v. EEOC, ___ F. Supp. ___, 33 EPD ¶34,180 (D. Kan. 1983) (upholding validity of the Guidelines).

VII. But Title VII offers no haven to violators of state law, see 42 U.S.C. §2000e-7 and pp. 48-51, supra, and it would turn both laws on their heads and offend public policy to treat non-complying employers better than those who obeyed an apparently valid state law.

In sum, all available evidence suggests that extension of benefits would be the appropriate remedy under Title VII if this suit had been brought by male employees. The remedies cannot be different merely because employers sued first.[74]

---

[74] Indeed, the fact that male employees have not previously sued to obtain the benefits accorded by §12945(b)(2) suggests that most disabled males already routinely receive these benefits - either as a result of formal personnel policies or simply discretionarily. A wide variety of statistics indicate that many employees receive unpaid leaves of absence with job security. See Brief of National Organization for Women, et al., amici curiae, for a fuller description of these data. The general availability of this employment benefit reveals that it is convenient, inexpensive, and not burdensome on employers.

C. The Relief Cal Fed Seeks, Striking §12945(b)(2), Is Inconsistent With This Court's Equal Protection Cases And Would Be An Inappropriate Judicial Response To A Finding Of Conflict Between State And Federal Law

In analogous cases involving underinclusive statutes which violate equal protection guarantees, this Court's opinions routinely grant the non-discriminatory provision of benefits to the previously excluded class. Title VII operates like the Equal Protection Clause in this case, in that neither requires that states provide any particular kind of benefit but both impose an equality standard on the manner in which benefits must be accorded. Thus, even if the court were to find §12945(b)(2) underinclusive in a manner inconsistent with Title VII, closely analogous equal protection caselaw reveals that extension of benefits, not nullification of the statute, would be the appropriate remedy.

The large majority of cases involving

denials of, or restrictions on access to, benefits have been resolved by provision of benefits to the previously excluded class, not by the withdrawal of benefits from those who previously enjoyed them. This principle has prevailed whether the benefit, and the unlawful limitation on its receipt, derived from federal or state law. For example, this Court has struck provisions of state laws imposing residency and citizenship requirements for state health and welfare programs, Shapiro v. Thompson, 394 U.S. 618 (1969), Graham v. Richardson, 403 U.S. 365 (1971), Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); it has invalidated statutes limiting access to public education, Plyler v. Doe, 457 U.S. 202 (1982), and Mississippi University for Women v. Hogan, 458 U.S. 718; it has recognized the right of illegitimate children to obtain a variety of benefits previously withheld by discrimi-

natory state and federal statutes, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), Jimenez v. Weinberger, 417 U.S. 628 (1974); and it has extended social security and other benefits to men and women previously denied them by discriminatory statutes, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), Califano v. Westcott, 443 U.S. 76 (1979), Califano v. Goldfarb, 430 U.S. 199 (1977), and Frontiero v. Richardson, 411 U.S. 677 (1973).

As these cases indicate, judicial remedial power extends to curing unequal treatment by requiring that those who have been excluded from benefits receive them, even if infringement on state law and imposition of substantial costs result.[75]

---

[75] The Court has declined to order extension only in limited circumstances. See Stanton v. Stanton, 421 U.S. 7 (1975) (remand for a determination of age of majority under state law); Orr v. Orr, 440 U.S. at 283-84 (remand to determine if continuing obligation to pay alimony derived from "stipulated agreement ... (footnote cont'd)

These cases suggest that, even if the Court perceives a conflict between §12945(b)(2) and Title VII, the proper remedy for §12945(b)(2)'s underinclusiveness is extension of the statute's benefits to all disabled employees. This would clearly be required if the statute explicitly excluded men; the fact that it is worded affirmatively instead of negatively should not alter the result.

Extension would not constitute usurpation of state authority:[76] it would be less disruptive than striking a benefit California clearly intended to provide (although, of course, the legislature would remain free to revoke §12945(b)(2) if it chose to). See, e.g., R.B. Ginsburg, "Some Thoughts On Judicial Authority to Repair Unconstitutional Legislation," 28 Clev. St. L. Rev. 301, 316-17 (1979). Nor will extension result in the imposition of a substantial financial burden on employers, since the primary benefit is unpaid leave. Even if curing discrimination would result in some increased costs, that would not justify denial of such a remedy:

> The cost of providing complete health insurance coverage for the dependents of male employees, including pregnant wives, might exceed the cost of providing such coverage for the dependents of female employees. But ... no such justification is recognized under Title VII once discrimination has been shown.

Newport News, 462 U.S. at 685 n.26 (emphasis added; citation omitted). See also Los Angeles Dept, of Water & Power v. Manhart, 435 U.S. at 716-17.

---

or other grounds of gender-neutral state law"; Craig v. Boren, 429 U.S. 190, 210 n. 24 (1976) (statute establishing separate drinking ages for men and women invalidated; legislature invited to recast it in gender-neutral terms). But see Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (remand to permit state courts to determine whether to extend or nullify underinclusive state statute).

[76] Indeed, as the Brief of National Organization for Women, et al., amici curiae, reveals, §12945(b)(2) was promoted and supported as a measure to provide pregnant women with benefits men already had and to undo the effects of Gilbert v. General Electric Co., 429 U.S. 125.

Conclusion

For the foregoing reasons, the Court should vacate the judgment below and remand with instructions to enter declaratory judgment (1) that §12945(b)(2) is not preempted by Title VII, and (2) that Cal Fed would violate Title VII if it complied with §12945(b)(2) by providing leaves of absence with job security to women temporarily incapacitated by pregnancy without providing the same benefits to other employees similar in their ability or inability to work.

Respectfully submitted,

JOAN E. BERTIN
Counsel of Record
ISABELLE KATZ PINZLER
GEORGE KANNAR
CHARLES S. SIMS

American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for *Amici Curiae*

APPENDIX

Statements of Interest of Amici Curiae

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. To help eliminate the pervasive problem of gender-based discrimination, the ACLU has established the Women's Rights Project, which has appeared before this Court in many pregnancy discrimination cases.

In response to the instant litigation, the National Board of Directors of the ACLU, by a vote of 53-5, adopted policy that "reject[s] laws that single out pregnancy, pregnancy-related conditions, or the capacity

to become pregnant for ostensibly advantageous treatment. Such laws (1) symbolically reinforce stereotypical notions of the appropriate roles, capacities and commitments of women, (2) discourage employers from hiring women, (3) conflict with our principled commitment to equal treatment of men and women, and (4) undermine the greatest practical protection women have against unfair treatment, namely, an insistence on strict equality of treatment between women and men...Where such laws apparently favor pregnant women, we favor remedies that extend such laws to all individuals based on their ability or inability to work." (The ACLU of Southern California ("ACLU/SC") does not concur in all of the views expressed in this brief. The ACLU/SC believes that California's pregnancy disability statute should be upheld. The grounds for this position will be expressed in amicus briefs of other

organizations and individuals to be filed with the Court. If the statute is not upheld, the ACLU/SC agrees that adequate disability benefits ought to be extended to all men and women.)

The League of Women Voters of the United States ("LWVUS") is a national non-partisan political membership organization with 110,000 members in more than 1,250 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. Since it was founded in 1920, the League's purpose has been to promote political responsibility through informed and active participation of citizens in government. From its inception, the League has worked for equal rights. The League believes that no person or group should suffer legal, economic or administrative discrimination. To further its commitment to equal access to employment, the League has participated as an

amicus in many of the major cases challenging race and sex discrimination in employment and has worked for passage of federal legislation that would eliminate discrimination, including the Pregnancy Discrimination Act of 1978. The League has also worked to ensure the adoption of effective regulations to implement those laws.

The League of Women Voters of California is the California affiliate of the LWVUS, and has worked at the state level for the adoption of laws and regulations to provide equal access to employment for women in California.

The National Women's Political Caucus is a nationwide, multipartisan organization with 73,000 members, in over 300 state and local caucuses, dedicated to obtaining equal representation of women in elective and appointive office and to speaking out on issues of direct concern to women. The elimination of sex-based employment and economic discrimina-

tion has been a central concern of the National Women's Political Caucus since its founding in 1971.

The Coal Employment Project ("CEP") is a non-profit organization formed in 1977 to perform educational and legal functions to eliminate the systematic sex discrimination in the coal mining industry. One of CEP's major undertakings in recent years has consisted of organizing for, and urging the United Mine Workers of America to adopt, as one of its collective bargaining positions in negotiation with coal mine operators, a decent gender-neutral maternity/paternity leave .